IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-537

INTERNATIONAL ASSOCIATION OF MACHINISTS, AND AEROSPACE WORKERS, AFL-CIO, et al.,
Petitioners,

vs.

HOWARD HOPKINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

PLATO E. PAPPS
1300 Connecticut Avenue
Washington, D. C. 20006
L. N. D. WELLS, JR.
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247
SAM HOUSTON CLINTON
600 West 7th Street
Austin, Texas 78701
Counsel for Petitioners

Of Counsel:
MULLINAX, WELLS, MAUZY & BAAB, INC.
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247
CLINTON & RICHARDS
600 West 7th Street
Austin, Texas 78701

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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The petitioners, International Association of Machinists and Aerospace Workers, AFL-CIO, and its local affiliate, Aeronautical and Industrial District Lodge 776,[1] respectfully pray

[1] These two separate entities are jointly certified by NLRB and recognized at General Dynamics as a single bargaining representative. We refer to them throughout this petition in the singular: "I.A.M."

that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings[2] on June 9, 1976.

OPINIONS BELOW

The three separate opinions of the three-judge panel of the Court of Appeals for the Fifth Circuit are reported at 533 F.2d 163; 171; 173; *sub nom Cooper v. General Dynamics, Convair Aerospace Div.* They are reproduced in the Appendix at pp. A-2; A-15; and A-19, respectively.

The Opinion of the District Court for the Northern District of Texas is reported at 378 F.Supp. 1258. It is reproduced in the Appendix at p. A-28.

JURISDICTION

The Court of Appeals denied rehearing on August 9, 1976. This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[2] The case is styled in both the District and Circuit Courts as *Cooper, et al., Plaintiffs v. General Dynamics, et al., Defendants.* Plaintiff Cooper's claim was dismissed in the trial court. The only remaining plaintiffs are Howard T. Hopkins and Rita Kimbell.

QUESTION PRESENTED

Do either the Civil Rights Act of 1964,[3] or the 1972 Amendments thereto[4] provide exceptions to or modify the union security provisions of the Labor Management Relations Act of 1947 (Taft-Hartley), 29 U.S.C. §§ 158(a)(3); (b)(2).[5]

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(a)(3); (b)(2) (1947) declares federal policy approving union shop provisions in collective bargaining agreements. It provides:

> § 158. Unfair labor practices
>
> (a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such

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[3] §703; 42 U.S.C. §2000e-2.

[4] §701(j); 42 U.S.C. §2000e(j).

[5] This question necessarily includes the related question as to whether the 1972 Amendment to Title VII defining "Religion" reaches and protects refusals to give financial support to labor organizations.

employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

The Civil Rights Act of 1964 in § 703 (42 U.S.C. § 2000e-2), prohibits employment discrimination because of religion, viz:

§ 703 (a) It shall be an unlawful employment practice for employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 703 (c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The 1972 Amendments to the Civil Rights Act added to § 701, a new subsection (j), 42 U.S.C. § 2000e(j), which provides:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT OF THE CASE

Hopkins and Kimbell, long-time employees of General Dynamics Convair Aerospace Division ("G-D") at Fort Worth, Texas, sought to enjoin the application of the "agency shop" provision of the collective bargaining agreement between their bargaining representative ("I.A.M.") and their employer, G-D.

Plaintiffs are employees of G-D, long-time members of the Seventh Day Adventist Church ("Church"), and long-time voluntary members of I.A.M., until their resignation from I.A.M. in the 1960's.[6]

Each plaintiff had long enjoyed the wages and working conditions provided in a series of collective bargaining agreements between G-D and I.A.M.. Prior to their resignations from I.A.M., but while active members of the Church, each had sought and obtained union representation in presentation of their individual grievances.

After resignation from I.A.M., each continued to be represented by I.A.M., the NLRB certified union, and to enjoy the wages and working conditions negotiated for them by the unions. They did not pay for this representation. A large group of the several thousand G-D employees likewise were "free riders" with respect to payment for union representation.

So in 1972 the union for the first time sought and obtained an "agency shop" provision in the collective agreement. This provided in pertinent part:

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[6] *Hopkins* was employed by G-D in 1950, at which time he was a voluntary member of the unions from which he did not resign until 1967. He joined the Church in 1954.

Kimbell likewise was employed by G-D in 1950, at which time she had been since 1943 a member of the Church. She joined the unions in 1953 and resigned in late 1961.

Section 1. Membership in the Union is not compulsory. Employes have the right to join, not join, maintain, or drop their membership in the Union as they see fit. Neither party shall exert any pressure on or discriminate against an employe as regards such matters.

Section 2. Each employe in the bargaining unit, shall beginning on the 31st day following the execution of this Agreement or the 31st day following his employment, rehire, reinstatement, reemployment, recall, transfer or regression into the bargaining unit, as a condition of continued employment in the bargaining unit, execute and deliver to the Company a payroll deduction authorization as provided for in this Article, or pay directly to the Union an amount of money equal to the Union's regular usual initiation fee and its regular, uniform and usual monthly dues. . . .

* * * * * * * *

Section 4. No employee within the bargaining unit shall be required to pay fees or dues covering any period during which the employee was not in the bargaining unit or was not on the Company's active payroll including layoff. . . .

Upon written demand from the Union, the Company shall terminate any employe within the bargaining unit who fails to tender the sum due the Union under Section 2 of this Article within thirty (30) days from the date such sum is due, provided the Union informs the Company and the employe in writing and allows him an additional fifteen (15) days after the 30th day of delinquency. If the employe fails to resolve his dues delinquency with the Union during this fifteen (15) days period and after notification to the Company by the Union, the Company will terminate the employe effective the end of that payroll period.

Thus plaintiffs, who have benefitted for twenty-five years from the wages and conditions obtained through collective bargain-

ing by the union, are required only to pay for the representation which benefits them. As the District Court found: "They [the plaintiffs] have merely been requested to pay their share of the cost of the collective bargaining which has resulted in direct financial benefits and job security to them."[7]

Objections to required union "membership," fealty, attendance at meetings, or concerted activity by plaintiffs, and others of like mind have thus been "accommodated."

Plaintiffs refused to pay for their representation as required by the collective bargaining agreement—and brought this suit against their employer, G-D, and the unions, petitioners here.

The District Court, after hearing evidence, dismissed on the basis of the opinion reported at 378 F.Supp. 1258; App. P. A-28.[8]

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[7] 378 F.Supp. at 1262; App. A-33.

[8] The district court found plaintiffs "sincere in their religious convictions and are now conscientiously committed to their Church's position that its members should not belong to or contribute financial support to a labor organization." 378 F.Supp. at 1260; App. A-29.

The District Court found further that plaintiffs had not been asked to subscribe to any tenets or doctrines of unionism or to engage in any strikes or violence against their employer. "They have merely been requested to pay their share of the cost of the collective bargaining which has resulted in direct financial benefits and job security to them." 378 F.Supp. at 1262; App. A-33.

The District Court further found that the payment of the equivalent of union dues did not constitute "supporting violence against their neighbors" *Ibid.* at 1262; App. A-34; and noted that the "union security agreement promotes industrial harmony and lessens the possibility of violence by providing an orderly procedure of resolving any disputes between an employer and its employees." *Ibid.*

The Circuit Court concluded, erroneously we think, that these latter findings indicated the Court's view that plaintiffs' religious beliefs "were illogical"—and thus spurious, 533 F.2d at 165; App. A-3; Cf. dissent at 533 F.2d p. 173.

The questioned findings concern the question of the "accommodations" which have been made to plaintiffs' sincere religious convictions that one should love one's neighbor. They do not, as Judge Rives suggests, at p. 173, attempt to "analyze the logic of the assumptions involving those beliefs." Cf., Gee Opin., p. 166.

Plaintiffs appealed, "predicated on the [asserted] collision between the union security agreement, on the one hand, and the 1972 Amendments of the Civil Rights Act, on the other hand"

(Appellants' Brief to Circuit Court, p. 9).

The Fifth Circuit reversed,[9] by three separate opinions from the three judge panel.[10]

The Circuit Court found the "agency shop provision here in question is valid under the National Labor Relations Act, 29 U.S.C. § 158 (1970)"[11] sic; and that "the first amendment does not shield appellants from discharge for refusing to abide by this provision."[12]

The Court of Appeals further found that although the Civil Rights Act neither "precludes nor trenches in any direct way upon any employer's making a union security agreement. He and his union can make any they like and enforce it in the general run of cases . . ." (at p. 170; App. p. A-12), the agreement cannot be enforced "where compliance would run counter to a particular employee's religious conviction . . ." *Ibid.*

The issue is thus squarely posed: Does the Civil Rights Act provide an exception to the application of the clear provision of the Labor Act?[13]

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[9] 533 F.2d 163; App. p. A-1.

[10] The main opinion (by Judge Gee) finds only partial support in Chief Judge Brown's "special concurrence" (pp. 171-173), which more accurately should be labeled "partial dissent"; and on the matters here urged is in complete disagreement with Judge Rives ("concuring in part and dissenting in part"), pp. 173-177.

[11] Actually, §158 in its present form was enacted in 1947.

[12] At p. 166; App. A-3.

[13] The Court of Appeals remanded "for consideration and decision by the Court whether appellants' religious doctrine here involved can be reasonably accommodated by the employer and the union

REASONS FOR GRANTING THE WRIT

The traditional national labor policy favoring union security agreements, first specified in § 8(3) of the Wagner Act (1935), and refined in the 1947 Taft-Hartley Amendments to outlaw the "closed" shop—but to favor "union" and "agency" shop provisions, is bottomed on long experience that such agreements provide a stability to the collective bargaining process most likely to result in labor peace.[14]

The statutory purpose, "both to further peaceful labor relations, and . . . to require a fair sharing of the costs of collective

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without undue hardship to the conduct of the employer's business or to the union" 533 F.2d 163, 171, App. A-15.

Actually, the District Court had already found that the agreement did not require union membership (EEOC has held exemption from membership is "accommodation"—CCH-EEOC Decision ¶6430 at 4151, note 5.); that payment could be made either by pay deduction or directly; and that plaintiffs had not been asked to subscribe to any tenets or doctrines of unionism, or engage in strikes or violence—"they have merely been requested to pay their share of the cost of collective bargaining which has resulted in direct financial benefits and job security to them" 378 F.Supp. at 1262; App. A-33.

The remand is appropriate only if the Civil Rights Act modifies the agency shop provisions of the Labor Act. The clear holding by the majority of the panel in the Court of Appeals that it does—against the strong dissent that it does not, constitutes a final determination by the Court of Appeals, reviewable here.

[14] See S. Rept. No. 105, 80th Congress, 1st Sess. (1947) p. 5ff. Cf. Senator Taft's comments at 2 Leg. History, L.M.R.A., 1420-1422:

> We considered the [right-to-work amendment] arguments very carefully in the committee and I myself came to the conclusion that since there has been for such a long time so many union shops in the United States, since in many trades it was entirely customary and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union-shop contract. . . . I think it would be a mistake to go to the extent of absolutely outlawing a contract which provides for a union shop, requiring all employees to join the union, if that arrangement meets with the approval of the employer and meets with the approval of a majority of the employees and is embodied in a written contract.

bargaining",[15] has indeed provided stability in thousands of union security provisions in collective bargaining agreements covering literally millions of workers.[16]

The importance of the federal policy supporting union security contracts is evidenced by this Court's prior grants of certiorari involving attacks upon it.[17] Indeed, union security provisions have been frequently challenged in litigation both here and in the Courts of Appeal; and have always survived the challenge, against claims of conflict with the first and fifth amendments.[18]

Having failed to establish constitutional infirmities in union security laws, opponents of union security have often importuned the Congress to ban or modify it. But as the Ninth Circuit observed in *Yott v. North American Rockwell Corporation*, "Congress had repeatedly declined to enact exceptions to the union security provisions of the NLRA."[19] And the Court

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[15] *Linscott v. Miller, etc.*, 440 F.2d 14 (First Cir., 1971) at p. 17. Cf. *Radio Officers Union v. NLRB*, 347 U.S. 17, 40-41; *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-741 (1963).

[16] See U. S. Department of Labor, Bureau of Labor Statistics, 1975 Bulletin 1888 "Characteristics of Major Collective Bargaining Agreements at Table 2.1, p. 14.

[17] See *International Association of Machinists v. Street*, 367 U.S. 740, 6 L.Ed.2d 1141 (1961); *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 100 L.Ed. 1112 (1956); *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); Cf. *Radio Officers Union v. NLRB*, 347 U.S. 17 at 40-41 (1954).

[18] *Otten v. Baltimore & Ohio R.R.*, 205 F.2d 58 (2d Cir. 1953); *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971), cert. denied, 404 U.S. 872, 92 S.Ct. 77, 30 L.Ed.2d 116 (1971); *Gray v. Gulf, Mobile and Ohio R.R.*, 429 F.2d 1064 (5th Cir. 1970); *Wicks v. Southern Pacific Co.*, 231 F.2d 130 (9th Cir. 1956), cert. denied, 351 U.S. 946, 76 S.Ct. 845, 100 L.Ed. 1471 (1956). *Yott v. North American Rockwell*, 501 F.2d 398 (1974); *Hammond v. United Paper Workers Union*, 462 F.2d 174 (6th Cir. 1972, cert. den. 409 U.S. 1028).

[19] The Ninth Circuit held, 501 F.2d at 400, note 4:

> Congress has repeatedly declined to enact exceptions to the union security provisions of the NLRA. H. R. 11666, 89th

of Appeals in the instant case acknowledges that "numerous direct efforts to amend the union security provisions of the NLRA "have been beaten down."[20]

Having always survived frontal attacks in the Congress[21] and constitutional challenges in the Courts, union security agreements are nevertheless to be inoperative the majority below says, as to those where compliance with security provisions would run counter to religious conviction.

Half a million Adventists, and uncounted others, thus are excepted, the Circuit Court says, from application of the federal law by which for forty years the Congress has sought to advance industrial peace in the nation.

And this rewrite of the national labor policy is effected by judicial interpretation despite utter void of any suggestion in the legislative history that such result was intended; despite repeated Congressional rejections of attempts to make exceptions to union security legislation, and without regard to "the cardinal rule . . . that repeals by implication are not favored."[22]

Cong., 1st Sess. (1965) (To exempt persons with religious convictions from the union membership requirements of NRLA) (Referred to committee was only action taken); S.3203, 89th Cong., 2d Sess. (1966) (To protect persons conscientiously opposed to Union membership) (Defeated); S. 3153, 89th Cong., 2d Sess. (1966) (Made it unfair labor practice under NLRA to require persons conscientiously opposed to union membership to join 93d Cong., 1st Sess. (1973) (Amend NLRA a union) (Defeated); and recently, S. 2108, to make it an unfair labor practice for a labor organization to discriminate on account of race, color, religion or national origin) (Referred to Com. on Labor and Public Welfare). It is for Congress, which authorized union security clauses, not the judiciary, to carve out exceptions to those clauses.

[20] 533 F.2d 163 at 169, note 13; App. A-10.

[21] Congress has made two narrow and explicit exceptions, viz: (1) §14(b) (29 U.S.C. §164(b)) delegating to the states limited power to legislate regarding union security; and (2) exempting employees of "health care institutions" from union security obligations in the 1974 amendments to the Labor Act, 29 U.S.C. §169 (1976 Supp.).

This Court has recently unanimously held that the 1972 Amendments to Title VII did not impliedly repeal provisions of legislation relating to employment of Indians. The national policy with respect to Indians [like the national policy with respect to workers and collective bargaining], was not affected by the 1972 Act. *Morton v. Mancari*, 417 U.S. 535 (1974).

Paraphrasing *Mancari*, ". . . we simply cannot conclude that Congress consciously abandoned its policy of furthering [union security agreements] when it passed the 1972 amendments," 417 U.S. 535 at 551; 41 L.Ed.2d 290 at 301.

The Ninth Circuit, in *Yott v. North American Rockwell Corporation*, 501 F.2d 398 (1974), after detailing the many abortive efforts to obtain Congressional exceptions to the union security provisions of the NLRA, held: "It is for Congress, which authorized union security clauses, not the judiciary to carve out exceptions to those clauses," 501 F.2d at 401, note 4.

But in the instant case the Fifth Circuit holds those clauses inoperative "where compliance would run counter to a particular employee's religious conviction." 533 F.2d at 170, App. A-12.

In sum, a traditional policy basic to the collective bargaining process relating to union security clauses under which millions of workers are employed is here at issue.

The asserted interplay of two important federal statutes is presently proliferating litigation. See *Yott v. North American Rockwell*, 501 F.2d 398; *Burns v. Southern Pacific Transportation*, — F.Supp. —, 11 F.E.P. Cases 1441 (D.C. Ariz., 1976);

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[22] *Morton v. Mancari*, 417 U.S. 535 at 549, 41 L.Ed.2d 290 at 300 (1974).

McDaniel v. Essex International, W.D. Mich. No. K 74-288CA, decided 1976, unreported, copy included in Appendix to this petion at p. A-36; *Nottelson v. A.O. Smith Corp.*, E.D. Wisc. C.A. 75-C-220; *Pulcer v. Canteen Service*, E.D. Mich., Civil No. 4-72236.[23]

Each involves an Adventist's challenge to a union security requirement, in none has the plaintiff prevailed.

ARGUMENT

1

We have seen that the statutory protection of union security agreements repeatedly survived against claims that it violated constitutional guarantees.[24]

The 1972 Amendment to Title VII; the addition of subsection (j), upon which the decision below turns, was intended to do no more than "to protect the same rights in private employment as the Constitution protects vis-a-vis the government."[25]

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[23] Cf. *Parker Seal Co. v. Cummins*, 516 F.2d 544 (6th Cir. 1975) cert. granted, and pending argument as No. 75-478. Cf. *Hardison v. T.W.A.*, 375 F.Supp. 879, rev'd. and remanded in part and aff'd. in part, 527 F.2d 33 (C.A. 1975); *Reid v. Memphis Publishing*, 369 F.Supp. 684; 468 F.2d 346 (1972); on rehearing 521 F.2d 512, 11 CCH E.P.D. ¶10,759 (6th Cir. 1975).

[24] See notes 17-18, *supra*, p. 11.

[25] In introducing the 1972 Amendment to Title VII, Senator Randolph explained the proposed new subsection (j), viz:

> "I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or Local governments." 118 Cong. Record, Jan. 21, 1972 at p. 705.

The amendment passed without a single dissenting vote, *Ibid.*, p. 731. Surely had anyone believed that it would modify existing labor security legislation there would have been at least some ad-

If that was all that the 1972 amendment did, it did not in any way invalidate or impinge upon the union security provisions of the Labor Act. For, as we have seen those provisions had redundantly survived constitutional attacks. Moreover, that Act quite literally and specifically provides:

> That nothing in this subchapter, *or in any other statute of the United States* shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees . . . 29 U.S.C. §158(a)(3), emphasis added.

Title VII of the Civil Rights Act, as passed in 1964 had no effect on union security. EEOC long recognized as much. See the Commission's Sixth Annual Report at p. 12, where EEOC reported:

> The Commission was also required to determine whether an employee in a union shop may refuse to pay union dues on the grounds that such payments are prohibited by his religious beliefs. The Commission held that ". . . a union shop is not unlawful" and that Charging Party's refusal on religious grounds is protected by neither Title VII nor the First Amendment. Equal Employment Opportunity Commission, 6th Annual Report at 12 (1972). *See*, 42 U.S.C. 2000e-12(b).

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verse votes. Cf. note 6 to Judge Rives dissent at 533 F.2d at 176, App. A-26.

The legislative history relative to §§(j) demonstrates an even narrower intention than that of Senator Randolph above quoted. All that was actually sought was to overrule *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, aff'd. by equally divided Court, 402 U.S. 689 (1971), and thus to protect the observance of the Sabbath, as per the "guide line on discrimination because of religion" 31 F.R. 8370 (1966) and 32 F.R. 10298 (1967); 33 F.R. 3344 (1968), which related only to Sabbitarianism. See 118 Cong. Rec., Senate, Jan. 21, 1972 at pp. 706-714; 723, 730-731. Thus, union security was not intended to be affected.

Again in its Seventh Annual Report (1973) at p. 17, Section entitled: "Discrimination—Religion" this position was reiterated. And while in April, 1974, the Commission applied the 1972 amendment broadly in its decision Number 74-107 (April 2, 1974), the Commission there recognized the Labor Act's validation of the union security contract—and held "we do not reach the question of how to resolve the potential conflict between Title VII and §8(a)(3) of the National Labor Relations Act."[26]

In 1974, in testifying on proposed amendments to the Labor Act, the representatives of the Church recognized that neither Title VII, nor the 1972 amendments exempted Church members from the union security provisions of the Labor Act. As Senator Ervin noted: ". . . the Seventh Day Adventists, who object to being subjected to the regulations of the National Labor Relations Board filed a brief with the Committee [on Labor and Public Welfare]" urging that the National Labor Relations Act be amended by adding at the end thereof the following new section:[27]

"Individuals With Religious Convictions

Sec. 19. An individual employee of a nonprofit hospital who is a member of and adheres to tenets or teachings of a bona fide religion, body or sect which has historically held conscientious objections to join or financially supporting labor organizations or other associations of employees, shall not be required to join, pay dues, fees or other payments under any agreement involving union security including, but not limited to, all union or agency shop agreements. . . ."

And the Congress in 1974 adopted this proposal with minor language changes. If Title VII, or the 1972 amendments ac-

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[26] CCH-EEOC Decisions §6430 at page 4151.

[27] 93rd Congress, 2d Session, "Legislative History of the coverage of non-profit hospitals under the National Labor Relations Act, 1974" Public Law 93-360 (S. 3203) at p. 119ff. at 130.

tually provided the exemption which the majority of the Court of now Appeals has devised, there would have been no reason for the Church to propose, or the Congress to pass §19 (now 29 U.S.C. §169) when it brought the health care industry under the NLRA.[28]

If, as the majority below hold, §701(j) and other provisions of Title VII provide an exemption from application of an agency shop provision valid under Section 8(a)(3) on account of professed religious beliefs, employees of a newly covered "health care institution" would ipso facto be permitted to escape application of an agency shop provision.

But Congress obviously knew better, and to accomplish its intended purpose with respect to such employees, expressly and specifically amended the National Labor Relations Act by adding a new Section 19 to provide just such an exemption.[29] The genesis, development and rationale of the special consideration afforded employees of a health care institution were explained by the conferees in Conference Report No. 93-988, 93rd Congress, 2nd Session, p. 4:[30]

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[28] Since health care institutions are covered by Title VII, *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). Section 3 of the 1974 Act would be superfluous if the same exemption was required by Title VII. Cf. Senator Javits at 120 Cong. Rec. 93rd Cong., 2nd Sess. S. 7291 (May 7, 1974).

Cf. Court of Appeals (Rives) at 533 F.2d at 176, note 6, App. A-26.

[29] "Sec. 19. Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment . . ." 29 U.S.C. §169.

[30] Reprinted at pp. 352ff. at 355 of the Legislative History of the Coverage of Non-Profit Hospitals Under the NLRA, 1974, *supra*, note 27.

"Subsection (g) of the first section of the House amendment amended the Act by adding at the end thereof a new section 19 (relating to individuals with religious convictions). The new section 19 provided that employees of health care institutions who object to joining or financially supporting labor organizations on religious grounds shall not be required to do so as a condition of employment. The Senate receded with a clarifying amendment under which, *in recognition of the special humanitarian character of health care institutions*, an employee may make payments to a non-religious charitable fund in lieu of periodic dues and initiation fees . . ." (Emphasis added).

As well as reflecting Congressional judgment concerning the reach of Section 8(a)(3) of the National Labor Relations Act, the special consideration afforded employeees of health care institutions—"in recognition of the special humanitarian character of health care institutions"—evidences a Congressional intent that only in this precisely limited situation will professed religious beliefs antagonistic to the national labor policy be permitted to prevail. Otherwise, Congress is saying implicitly that the national labor policy enunciated in the National Labor Relations Act and consistently approved by judicial decision is applicable to all employees covered by a valid union security provision in a collective bargaining agreement. The literal language of the Labor Act validating union security arrangements remains operative by the express declaration that "nothing . . . in any other statute of the United States shall preclude an employer from making . . ." such agreement. 29 U.S.C. §158(a)(3).[31]

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[31] We do *not* assert (as the Court of Appeals' Opinion states) that which for all time lifts section 8(a)(3) above the general level of the quoted language of the Labor Act "is a true supremacy clause

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

PLATO E. PAPPS
1300 Connecticut Avenue
Washington, D. C. 20006

L. N. D. WELLS, JR.
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247

SAM HOUSTON CLINTON
600 West 7th Street
Austin, Texas 78701

Counsel for Petitioners

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the United States Code to a position comparable to the Constitution" (Gee Opinion, 533 F.2d at 169; App. A-11).

We do say that the literal language of the statute, "nothing in this subchapter, *or in any other statute of the United States* shall preclude an employer from making [a union security agreement]" means what it says; and until *Congress* legislates an exception, it is not for the Courts to find one.

APPENDIX

OPINIONS IN THE COURT OF APPEALS

Howard Cooper et al.,

Plaintiffs,

Rita Kimbell and Howard T. Hopkins,

Plaintiffs-Appellants,

v.

General Dynamics, Convair Aerospace Division, Fort Worth Operation, et al.,

Defendants-Appellees,

v.

International Association of Machinists and Aerospace Workers, AFL-CIO, et al.,

Defendants-Appellees-Appellants.

No. 74-3151

United States Court of Appeals
Fifth Circuit

June 9, 1976

David Watkins, Dallas, Tex., for plaintiffs-appellants.

Richard S. Cohen, EEOC, Charles L. Reischel, Washington. D. C., for E.E.O.C.

Louis A. Jacobs, Sp. Counsel to Atty. Gen., Columbus, Ohio. for Ohio Civil Rights Commission.

J. Olcott Phillips, Fort Worth, Tex., for Gen. Dynamics.

Otto B. Mullinax, L. N. D. Wells, Jr., Dallas, Tex., for Intl. Assoc. etc.

Sam Houston Clinton, Jr., Austin, Tex., for Dist. Lodge 776, and others.

Appeals from the United States District Court for the Northern District of Texas.

Before Brown, Chief Judge, Rives and Gee, Circuit Judges.

Gee, Circuit Judge.

Appellants work for appellee General Dynamics (Employer) on a federal enclave in the Fort Worth area, where union security agreements are permitted,[1] and once belonged to defendant union and its defendant local (hereafter, collectively, the Union).

Appellant Kimbell's employment began in 1950, when she was already a Seventh Day Adventist. In the early 1960's, she withdrew from union membership on religious grounds. Appellant Hopkins' employment also dates from 1950, as does his union membership. He joined the Adventist Church in 1954 and withdrew from the union on religious grounds in 1967. In 1972, for the first time, Employer and Union incorporated a union security provision in their collective bargaining agreement, one of the "agency shop" variety.[2]

Upon learning that financial support of the Union would be required of him by this new provision, each appellant protested to Employer and Union without success, commenced setting aside in trust the amount of such dues for contribution to some nonreligious charity if that were found acceptable, and went to court. After various vicissitudes, unnecessary to detail, the matter came to trial before our district court, where Employer and Union prevailed.[3]

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[1] Though not next door in Texas, a right-to-work state. Howard Cooper, an original plaintiff, took a nonsuit at trial.

[2] Under which union membership is not a condition of continued employment, but payment to the union of a sum equal to its current dues is.

[3] Appellants continue to work, apparently by tacit agreement of all parties, pending this case.

At trial the legal issues were three: the effect, if any, of the "religious accommodation" provisions of the amended Civil Rights Act on the application of the agency shop provision to appellants; Employer's right to recover from Union indemnity for attorney's fees incurred in resisting appellants' suit; and the effect of the Texas Right-to-Work law on the controversy. The last of these is not before us because appellants have not challenged on appeal the district court determination that state law lacked force on the federal enclave. As to the others, the court refused relief to appellants on the reasoning that their beliefs about supporting the Union financially, while both religious and sincerely held, were illogical—thus remitting the issue of whether the beliefs could be accommodated without undue hardship—and required Union to indemnify Employer for its attorney's fees. We reverse these holdings and remand for decision of the accommodation issue.

The Civil Rights Act and the National Labor Relations Act: Relevant Legislative, Judicial and Administrative Background

These pit the Union's entirely understandable desire that employees who receive the benefit of collectively-bargained wages and other benefits should bear a fair share of the cost of obtaining them against appellants' belief that supporting a union in any way is a Godless act which they should not be made to do to keep their jobs. Mercifully, in deciding this distressing issue, we are asked to write on small portions only of an already-crowded slate.

[1-3] On the Union's side, there can be no doubt that the agency shop provision here in question is valid under the National Labor Relations Act, 29 U.S.C. § 158 (1970), or that in the present state of constitutional law the first amendment does not shield appellants from discharge for refusing to abide

by this provision. *See Gray v. Gulf, M & O R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001, 91 S.Ct. 461, 27 L.Ed.2d 451 (1971). As for appellants, we must take as given the district court's findings, based on evidence substantial and sufficient, that the Seventh Day Adventist Church maintains a long-established doctrine that joining or financially supporting a labor union is an act inconsistent with the commandment to love one's neighbor, the employer; that appellants are each members of that church; and that each holds with sincerity and as a matter of religious conviction that by supporting a union he places his soul in jeopardy.[4] The matter thus comes down to statutory construction: what has Congress said should be done about such painful collisions?

Section 703 of the Civil Rights Act of 1964 provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . .
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

[4] Having held so much, the district court then evaluated the tenet and concluded that it was irrational and specious, since appellants were not being asked to subscribe to union doctrine or to support strikes or violence against their employer, and since arguably the collective bargaining arrangement promotes industrial peace and thus lessens the possibility of violence. That appellants were producing parts for military aircraft did not escape the court's notice, either. These telling arguments address an issue that is not for federal courts, powerless as we are to evaluate the logic or validity of beliefs found religious and sincerely held. *United States v. Seeger*, 380 U.S. 163, 184-85, 85 S.Ct. 850, 863, 13 L.Ed.2d 733, 747 (1965).

> or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . .
>
> . . . . .
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . .
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's . . . religion . . .
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2 (1970).

Initial EEOC guidelines promulgated on the subject, while recognizing a general obligation to accommodate employees' religious needs where this could be done without serious inconvenience, permitted an employer to adopt any "normal work week" and holiday schedule generally applicable to all employees, without regard to or accommodation of employees' religious observances, absent intent to discriminate on religious grounds. A subsequent and replacing regulation, however, adopted in 1967, took a firmer line: employers were required to make reasonable accommodation, short of undue hardship, to the religious practices of the employees:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703

(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

Initial decisions by the courts tended toward a narrow interpretation of the statute and guidelines. In *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (1970)), a divided Sixth Circuit held it a sufficient accommodation of Sabbath observance to permit the affected employee to arrange his own replacement, despite his protest that Sunday work was so inherently sacrilegious that his inducing another to do it in his place would be sinful. That decision was affirmed by an equally divided Supreme Court.[5] Central to the reasoning of the circuit court and of several contemporaneous district court decisions[6] was a distinction between discrimination and a mere refusal to accommodate normal work rules of general application to the complainant's special religious claims. In the face of an ambiguous statute, of changing EEOC regulations, and of the

[5] 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971).

[6] *Riley v. Bendix Corp.*, 330 F.Supp. 583 (M.D.Fla.1971), *rev'd.* 464 F.2d 1113 (5th Cir. 1972); *see Dawson v. Mizell*, 325 F.Supp. 511 (E.D.Va.1971) (action taken under Executive Order 11478).

notion—intimidating at first blush—that a broad construction might cripple employers in a cross fire of religious demands, the courts[7] by 1971 appeared to be settling into a view that the statute concerned itself primarily, if not solely, with Sabbath observance[8] and that general rules, applied without discriminatory intent, were acceptable even though their effect in practice might not always be impartial. In 1972, however, with unusual promptness and unanimity, Congress responded to this modest trend by making clear that this was not what it meant.

The 1972 Amendment Defining Religion: Limited to Sabbatarianism?

[4] Acting in what can only be viewed as a direct response to the Sixth Circuit's expressed doubts in *Dewey* about the EEOC's power to adopt such regulations as its revised guidelines—explicit reference to the decision and its affirmance by equal division is made in the legislative history, as is shown in our next footnote—Congress added to the Civil Rights Act of 1964 a definition of religion. This "definition," set out below in the margin, exhibits the curious feature of defining as religious every aspect of observance, practice, and belief of that nature except whatever the affected employer can show he cannot accommodate without undue hardship to his business activities. Nevertheless, though it may make the stylist blanch, the definition possesses that most precious of statutory qualities: it cannot be misunderstood. If the employee's con-

[7] Though not all of them. The district court in *Dewey* found that plaintiffs' rights had been violated, as did the court in *Jackson v. Veri Fresh Poultry, Inc.*, 304 F.Supp. 1276 (E.D.La.1969), a similar case involving Sabbath observance.

[8] Encouraged by the title given by the EEOC to both the original and revised guidelines on the subject: "Observance of Sabbath and religious holidays."

duct is religiously motivated, his employer must tolerate it unless doing so would cause undue hardship to the conduct of his business. And if the text left room for doubt, as it does not, the legislative history removes it.[9]

[5, 6] We are unable to reconcile with section 701(j)'s sweeping terms ("all aspects of religious observance and practice, as

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[9] Unable to improve upon Judge Tuttle's exposition of this history in his *Riley* opinion for this court, we quote it in full:

> In an amendment to the Civil Rights Act of 1964, approved by the Senate of the United States on March 6, 1972, and by the House of Representatives on March 8, 1972, the following provision was added to Section 701:
>
> "(7) After subsection (i) insert the following subsection (j):
>
> (j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."
>
> The total legislative history of this amendment appears at 118 Congressional Record, §§227-253. There is appears that Senator Randolph, of West Virginia, who sponsored the amendment, explained that it was designed to resolve the issue left open by the equal division of the Supreme Court of the United States in *Dewey v. Reynolds Metals Company*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971). At 118 Congressional Record, §228, Senator Randolph said:
>
> "I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days."
>
> It is significant that this measure was passed by a unanimous vote in the Senate.
>
> The legislative history shows similar approval by the House of Representatives after the Chairman of the House Committee made the following explanation:
>
> "Section 701(j)—This subsection, which is new, defines 'religion' to include all aspects of religious observance, practice and belief, so as to require employers to make reasonable accommodations for employees whose 'religion' may include observances, practices, and beliefs such as sabbath observance, which differ from the employer's or potential employer's requirements regarding standards, schedules, or other business-related employment conditions.
>
> Failure to make such accommodation would be unlawful unless an employer can demonstrate that he cannot reasonably accommodate such beliefs, practices, or observances without undue hardship on the conduct of his business.
>
> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metals Company*, 429 F.2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S.Ct. 2186, 29 L.Ed.2d 267] (1971)." 118 Congressional Record, pp. 1861-1862.

Riley v. Bendix Corp., 464 F.2d 1113, 1116-17 (5th Cir. 1972).

well as belief . . .") the Union's suggestion that Congress intended by it to protect Sabbath observance only. When the legislature speaks plainly, he is entitled to be taken at face value. The language chosen is broad—broader can hardly be imagined—and entirely extravagant to a mere concern for Sabbatarianism or any other particular doctrine or observance. Instead, the definition is what may be termed an operative one: *all* forms and aspects of religion, however eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a businesslike operation. The Civil Rights Act extends to the religious doctrine implicated here.[10]

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[10] In *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), the Ninth Circuit reaches a similar conclusion. And

Other Union Contentions Regarding Section 701(j)

Three other contentions by the Union require treatment. The first, an assertion that section 701(j) applies only to employers, relates to a point on which the court has divided and which is treated below in the section of this opinion entitled "Accommodation and Hardship: By Whom and to Whom?"

[7] Next, in two related arguments, the Union maintains that section 701(j) and the other provisions of Title VII may not be appropriately viewed as exemptions from the application of agency shop provisions sanctioned by section 8(a)(3), pointing to that section's "supremacy clause"[11] and to the fact that when Congress wished to provide a "religious conviction" exemption from union security agreements for employees of health care institutions, it did so by a severely limited and narrow amendment to the National Labor Relations Act itself.[12] From these considerations, it is said to follow that Congress would not likely have intended to enact a broad and general exemption to 8(a)(3) for religious scruples by passing and later amending Title VII.[13]

We conclude, however, that the language of 8(a)(3) to which the Union refers, commencing with "nothing in this subchapter," does not bear the sense that the Union seeks to place

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our panel in *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5 Cir. 1975), necessarily assumed a reach in the Act beyond Sabbatarianism, though the point was apparently not contested there.

[11] "[N]othing in this subchapter, or in any other statute of the United States, shall preclude an employer from making [a union security agreement] . . ." 29 U.S.C. § 158(a)(3) (1970).

[12] 29 U.S.C. § 169 (Supp. IV 1974).

[13] It is certainly correct that, as has been noted by our Brothers of the Ninth Circuit, numerous direct efforts to amend the NLRA in such respects have been beaten down. *Yott v. North American Rockwell Corp.*, 501 F.2d 398, 400-01 n.4 (9th Cir. 1974).

upon it. The passages of 8(a)(3) that authorize union security agreements are exceptions to the main body of that section, both structurally (as contained in a proviso) and conceptually (as reservations from the thrust of the section's major idea). Language in other portions of the section, and doubtless elsewhere in statutes of the United States, can be read as conflicting with this union-security proviso of 8(a)(3). It is, therefore, not surprising that the section incorporated language making plain that, despite these seeming conflicts, union security agreements *are* authorized, anything in the statutory system as *then constituted* notwithstanding. So far, so good. But to go on, as would the Union, to a conclusion that the quoted language is a true supremacy clause, which for all time lifts section 8(a)(3) above the general level of the United States Code to a position comparable to the Constitution, would be a startling measure indeed. For various reasons, it seems unlikely that this was Congress' intent.

[8] In the first place, a heirarchy of statutory dignities is foreign to our governmental scheme. We save constitutions that take permanent precedence over statutes; we are not accustomed to statutes that do so, and congressional intent to enact such a thing would be novel, a thing we would not lightly discern from language susceptible of other meanings. Second, the provision has an entirely rational and necessary function in the union security proviso of section 8(a)(3)—that discussed in the next preceding paragraph—so that we need not seek its raison d'etre in such an unusual purpose as that advanced by the Union. Finally, Congress' recent passing of the health-care-institution exemption itself, codified at 29 U.S.C. § 169, without undertaking to amend section 8(a)(3) as a condition precedent to that action, indicates that it accords to section 8(a)(3) no such commanding status as the Union advocates.

And indeed we think Congress rather plainly correct in this perception, for neither the passage of the health-care-exemp-

tion nor the passage and amendment of Title VII precludes or trenches in any direct way upon any employer's making a union security agreement. He and his union can make any they like and enforce it in the general run of cases—in all except the unusual one where compliance would run counter to a particular employee's religious conviction, sincerely held, that can be accommodated without undue hardship.

The Indemnification Claim

[9] In closing the majority portion of this opinion, we dispose of our last claim—the Union's contention that the trial court improperly required indemnification of Employer for attorneys' fees and expenses incurred in defending this cause of action. We agree with the Union. The district court based its award on an indemnity provision of the collective bargaining agreement, which provided that local union would

> defend, save, hold harmless and indemnify [Employer] from any and all claims, demands, suits or any other forms of liability that . . . arise out of the execution, placing in effect or carrying out the terms of [the Article concerning payment of union dues.]

But the local, which stood ready to defend Employer, was never requested to provide representation. Employer wanted its own counsel, fearing that loss of this case might adversely affect its interests in other litigation.[14] Thus, Employer chose

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[14] Employer's vice-president and counsel, Booth, explained in testimony why he decided that Employer should employ its own counsel:

> A. Well, we have been talking about the federal enclave here, and it has been made an issue in this litigation; and
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> There is more at stake to General Dynamics as a matter of the federal enclave than there is to the local or district lodge of the International Union. We felt that—we have a litigation in process in Austin, Texas, in Travis County, in connection with the franchise tax; and
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> We had one litigation in the early sixties with reference to the ad valorem tax situation upon our property on the enclave, or the property on the enclave; and
>
> We felt, as a matter of good business judgment, it prudent, in protection of our own interests, and in connection with the enclave and our problems with the enclave, that we could best do this by retaining our own counsel.
>
> Q. Do you feel there might possibly be some conflict of interest if the union attorney was solely representing your interests in this case?
>
> A. We felt that.

to retain its own attorney for its own reasons and purposes; and under these circumstances, the indemnity provision does not apply.

Accommodation and Hardship: By Whom and to Whom?

Chief Judge Brown and the writer concur in holding that consideration of all reasonable accommodations of appellants' religious beliefs, including one which permits their nonpayment of union dues or the equivalent while continuing regular work assignments with their employer, is mandated by the sweep of section 701(j). For the reasons stated in his separate opinion, Judge Rives does not agree that such an accommodation should be considered, though he agrees that accommodations short of this should be. Judges Brown and Rives concur that, whatever range of accommodations is to be contemplated, hardship to the union, as well as hardship to the Employer, must be considered in evaluating them. Because of what the statute says, I am unable to agree.

Section 703 of the Civil Rights Act forbids, *inter alia*, an employer to discharge an employee for his religion and forbids a union to make or try to make an employer do so. Section 701(j) of the same Act defines "religion" as including every religious

belief, observance or practice "unless an *employer* demonstrates that *he* is unable to reasonably accommodate to [it] without undue hardship on *the conduct of the employer's business.*" (emphasis added). This is all. My Brothers add to the definition the factor of "undue hardship to the union." As I read Judge Brown's opinion, their reasons for doing so are that the union has a serious interest in the matter, that the statute would be more symmetrical this way (if one is to have an escape hatch, the other should have it, too), that a weakened union may produce hardship to the employer, and that such a statute would be more in line with "the overriding and evident policies of Congress." With deference, none of these reasons persuades me, or even approaches persuading me, that when Congress has said *A*, in words which admit of neither construction nor misunderstanding, we should say *A and B*.

As for the reasons themselves, I answer: Indeed, the union does have a serious interest in this matter, one which should be presented to Congress for its consideration rather than to us. As for symmetry, neither the Labor Relations Act nor the Civil Rights Act is notable for it; each prohibits things to some people but not to others, and the thrust of each is toward equalizing unequal situations rather than an abstract symmetry. The next notion, that a weakened union may be seen as a hardship to the employer is conceivable but seems foreign to the perceptions both of Congress (which specifically permitted right-to-work laws and decreed employee elections that often result in no union at all) and of most employers who appear before us. Finally, the overriding congressional policies which my Brothers find evident are not so clear to me. I prefer to seek these in the words of the statute, what the Congress has solemnly *said* on this particular subject.

I therefore dissent from the result insofar as it directs the trial court to weigh union hardship in determining whether appel-

lants' beliefs are a "religion" for purposes of section 701(j).[15] I do so because, in sum, under this direction that court may find that these admittedly religious beliefs *can* be reasonably accommodated by the employer without undue hardship to the conduct of his business—all that the statute provides—and still hold that they are not entitled to the protection of a statute specifically enacted to do so.

Conclusion

The judgment of indemnity is REVERSED, and the judgment is here RENDERED for IAM and Lodge 776. The judgment in favor of General Dynamics is REVERSED and REMANDED for further proceedings not inconsistent with the consensus majority opinion, that is, for consideration and decision by the court whether appellants' religious doctrine here involved can be reasonably accommodated by the Employer and the Union without undue hardship to the conduct of the Employer's business or to the Union.

John R. Brown, Chief Judge (specially concurring):

I

I concur fully in the result and the Court's opinion so far as it goes. My difference is that it does not go far enough. And lest in silence be misinterpreted as an implied rejection I would

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[15] My Brothers also ascertain a duty to accommodate on the part of the union. *See e.g.*, note 1, concurring opinion of Chief Judge Brown, *infra*. I fully agree with the reasoning of that footnote insofar as it finds in section 703(c)(3) a duty on the union's part not to interfere with an *employer's* attempt to accommodate under section 701(j). To this extent and in this sense only, the argument is impeccable, but it carries me no further. But it may be that if the majority is resolved to inject the concept of union hardship into section 701(j), it is as well to import also the corresponding duty to accommodate—even at the expense of further violence to the statute.

hold that the inquiry on hardship should not be confined to the employer alone. The inquiry must also include hardship to the Union.

II

A majority is in agreement—apart from the question urged so well by Judge Rives' dissent on the immunity of Union dues from the reach of Section 701(j)—that the substantive restraints of Section 701(j) forbidding religious discrimination applies to employer and Union alike and each has a duty of accommodation.[1]

[10] But the remand ordered confines the question of hardship to hardship to the employer alone with not a single mention of hardship to the Union. I am of the firm opinion that where the asserted religious discrimination grows out of a collective

[1] It is perfunctorily asserted that section 701(j) applies only to employers, not to unions. The contention derives such plausibility as it has from the circumstance that the definition of "religion" embodied in that section, quoted at footnote 9 above, contains a reference to accommodation by an employer, but none to accommodation by a union. It must be remembered, however, that the term "religion" is defined for purposes of section 703 of the same Civil Rights Act. That section, in its subsection (c)(3), defines union misconduct in terms of employer misconduct, making it an unlawful employment practice for a union to cause or attempt to cause an employer to discriminate or discharge on grounds of religion. The customary procedure for enforcing agency shop agreements, and that provided for by Article Two, Section 5, of the agreement in effect here between Employer and Union, is discharge of the delinquent employee upon demand of the Union. Thus, for the Union to demand appellants' discharge for delinquency in dues-equivalent payments, when that delinquency is a consequence of their religious belief—a belief that Employer has not attempted to accommodate, and that it may yet be found able to accommodate without undue hardship—would be to do precisely what section 703(c)(3) denounces, And so, though perhaps backhanded, the application of section 701(j) to the Union and its acts is plain. These two sections when read together impose a duty on the union as well as the employer to accommodate the religious beliefs of employees.

bargaining contract, as it assuredly does here, the Union as a very real party in interest, has the right to demonstrate that accommodation would cause undue hardship to it and its interest. Thus I am in full agreement with part IV A of Judge Rives' opinion. The result is that we thereby construct a majority on this issue. On remand the Court must have appropriate hearings on hardship to both the employer and Union.

III

Of course there can be no running from the express language of Congress. The hardship is, by words, confined to "undue hardship on the conduct of the *employer's* business" (emphasis supplied). But reason argues overwhelmingly that in the structure of this statute Congress could not have thought that for two parties under the same stringent substantive prohibition one has an escape hatch of undue hardship denied to the other growing out of the common industrial setting.

IV

Of course one way to get to this destination is to reason that the Union's legitimate self-interest is an inevitable part of the inquiry into hardship to the employer. We must remember that the aim of all federal employment relationship legislation is the idyllic goal of industrial peace. The quest, of course, is not for some unrealistic hope for tranquility. The very relationship of management-labor poses contention in the very best use of that term. What is sought is a means by which these natural irrepressible continuous contentions can find resolution through civilized means not the brute strength of an employer's goon squad or violence on the picket line.

Our national commitment is to negotiation, dialogue, compromise and adjustment. But there cannot be this sort of negotia-

tion without negotiators. There is scarcely a situation proving so much the old saw that it "takes two to tango." Management, historically, has the resources to mount its vigorous negotiation. Workers, on the other hand, so our history proves are disadvantaged *unless*—and the unless is a big one—there is organization and the resources that comes from collective purpose and commitment. It is, therefore, to management's self-interest in the goal of peaceful setllement of the inevitable economic clashes that its adversary have, not necessarily equal, but at least formidable strength. This can come about only by resources. Resources include not only reasonable solidarity in employee support, but in the means by which to lend effective, not just zealous, support.

That means that in the process or art—by whatever name it is described—of negotiation the Union as the ordained collective bargaining representative must have strength. Strength comes not alone from money, but money is indispensible as these combatants enter the lists.

V

But to me it would be a mistake and a disservice to the overriding and evident policies of Congress—in its aim to blot out this blight on a meaningful democracy—to have to go to this indirection to find a legitimate interest in the maintenance of a strong vigorous advocate in this process of bargaining.

The Union should therefore have the right—equally with the employer—to demonstrate if it can that the practice condemned cannot be avoided without undue hardship to its legislatively ordained role.

VI

It is therefore clear to me that in assaying this Section 701(j) undue hardship factor, hardship to the Union as well as hardship to the employer should be considered.

Rives, Circuit Judge (concurring in part and dissenting in part):

I

I concur with the majority's disposition of the indemnity claim. Clearly, the district court erred in requiring the Union to indemnify the employer for his litigation costs.

II

I specially concur with part of the majority's decision concerning the employees' Title VII claim. With regard to this claim, the parties on appeal have presented us with the question of whether Congress, by enacting and later amending Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, provided an exception to the application of the agency shop provisions for employees who have religious objections to labor unions. See Pet. Brief at 9 n. 11; Resp. (IAMAW) Brief at 11. This question, however, actually involves two separate issues: (1) Does Title VII impose a duty on employers and unions to accommodate the religious beliefs of employees and (2), if such a duty exists, does its scope include granting employees with religious objections to labor unions an exemption from paying dues to a union which has negotiated an agency shop agreement with the employer pursuant to the National Labor Relations Act (NLRA), now appearing at 29 U.S.C. § 158(a)(3)

(1970).[1] The district court dismissed the Title VII claim on the ground that the employees' religious ideas were specious and that the court saw no conflict between their religious beliefs and the union security agreement. I agree with the majority that the district court's reasoning was not permissible. The district court itself found that, "All of the plaintiffs are sincere in their religious convictions and are now conscientiously committed to their church's position that its members should not belong to or contribute financial support to a labor organization." (App. 94.) This finding establishes that plaintiffs' religious beliefs are indeed incompatible with the agency shop agreement, and the district court should not have analyzed the logic of the assumptions underlying these beliefs. *United States v. Seeger*, 1965, 380 U.S. 163, 184-185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733, 747. Given this conflict between employees' religious beliefs and a job-related requirement, the court should have proceeded to decide if the Union and employer have a duty to accommodate under Title VII and, if so, the scope of this duty in light of the Union's right under the NLRA to contract with the employer for an agency shop.

III

Duty to Accommodate

In 1964 Congress passed Title VII of the Civil Rights Act, a statute making it an unlawful employment practice for an employer to discriminate against his employees on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000-2(a) (1970). The initial guidelines issued in 1966 by the Equal Em-

[1] "*Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees . . ."

ployment Opportunity Commission (EEOC)[2] interpreted the Act's prohibition against discrimination on religious grounds as imposing a duty on employers to accommodate the "reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business." 29 C.F.R. § 1605.1(a)(2). The guidelines went on to state, however, that the employer was free to establish a normal work week generally applicable to all employees, "notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees." 29 C.F.R. § 1605.1(a)(3). In 1967 the EEOC adopted new guidelines reinterpreting the employer's duty not to engage in religious discrimination. These new regulations contained no reference to the normal work week schedule and included a provision placing on the employer the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable. 29 C.F.R. § 1605.1(c). These changes did not go without notice in the Sixth Circuit's opinion in *Dewey v. Reynolds Metals Co.*, 6 Cir. 1970, 429 F.2d 324, a case involving the discharge of an employee for refusing to work on the Sabbath. Although the court held that the 1966 guidelines applied to the case under review, it went on to observe that the statute (42 U.S.C. § 2000e-2(a)) did not require an employer to make reasonable accommodation to the religious needs of his employees and thus questioned the authority of the EEOC to adopt such a regulation. 429 F.2d at 331 n. 1. The Supreme Court affirmed by an equally divided vote. 401 U.S. 932, 91 S. Ct. 919, 28 L.Ed.2d 212 (1970).

The Randolph Amendment to the Equal Employment Opportunity Act of 1972 was a direct response to the *Dewey* decision. This amendment, sponsored by Senator Randolph of West Virginia, defined "religion" as follows:

[2] This agency is charged with enforcement of Title VII. 42 U.S.C. § 2000e-4 (1970).

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

The Union contends that, despite the broad language used in this definition, the Randolph Amendment was intended to have a fairly limited purpose. Reference is made to the legislative history where Senator Randolph, a member of a small sect known as Seventh-Day Baptists,[3] told his fellow Senators of his concern over "the inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers." 118 Cong.Rec. 705 (1972). Seizing on this language, the Union contends that there is a duty to accommodate only those religious beliefs concerning observance of the Sabbath and related problems. Indeed, the regulation issued by the EEOC interpreting Title VII's proscription against religious discrimination is titled "Observation of the Sabbath and Other Religious Holidays." 29 C.F.R. § 1605.1 (1975). The official position of the Commission, however, is that Title VII does require employers and unions to accommodate an individual's religious belief against financially contributing to a labor organization. The language of the statute ("All aspects of religious observance and practice, as well as belief") does indeed extend beyond Sabbatarianism to include any belief that can be termed "religious." Authority for the proposition that this duty to accommodate attaches to religious objections against labor unions can be found in the Ninth Circuit case of *Yott v. North American Rockwell Corporation*, 9 Cir. 1974, 501 F.2d 398. Although the issue was uncontested, Title VII has been applied in this Circuit to a situation where an atheist was forced to resign

[3] According to Senator Randolph, this religious group observes the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening. 118 Cong.Rec. 705 (1972).

her job as a result of having to attend business meetings where devotionals were given. *Young v. Southwestern Savings and Loan Association*, 5 Cir. 1975, 509 F.2d 140. In light of the above, I think that Title VII does place a duty of accommodation on the employer and also on the Union.

IV

Scope of the Duty to Accommodate

A. Hardship

[10] Under the provisions of the statute, the duty to accommodate is limited by an exception for hardship. 42 U.S.C. § 2000e (j) provides:

". . . unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Although, for the reasons stated herein at length, I am of the view that the duty to accommodate does not include an exemption to paying union dues under an agency shop agreement, since the Court holds otherwise, I concur in Chief Judge Brown's concurrence on hardship to the Union.

While § 2000e(j) refers only to the hardship of the employer, to my way of thinking, the hardship provision was intended to modify the duty to accommodate and would include the hardship of any party subjected to the requirement of accommodation.

B. *A Union Dues Exemption for Religious Belief.*

Nowhere in the legislative history of the Equal Employment Act of 1972 is there any indication that Congress intended to amend the provision which now permits an agency shop agree-

ment, and thereby exempt employees who have religious objections to labor organizations from joining or paying a dues equivalence to their representative union. As observed by the Ninth Circuit in *Yott v. North American Rockwell Corporation, supra,* Congress has repeatedly rejected efforts to provide exceptions to the union security provision of the NLRA for employees who have religious convictions against union membership. 501 F.2d at 400 n. 4. If there had been any understanding by the members of Congress that section 701(j) of the 1972 Act could be used as authority for the EEOC to formulate a guideline which would weaken the union security provision of the NLRA, the Act would most probably have been defeated. Certainly it would not have received such a unanimous approval by both Houses as could be expected only for a noncontroversial provision. Given this history of congressional opposition to amending the union security provision of the NLRA and the unanimous approval of section 701(j), I am unable to conclude that Congress intended to adopt such a provision when it accepted the Randolph Amendment to the Equal Employment Opportunity Act of 1972.[4]

Additional evidence that an exception to the union security provision of the NLRA is not to be implied from passage of other statutes can be found in the language of the NLRA, 29 U.S.C. § 158(a)(3) (1970), which reads in part: "Nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor

[4] *Cf. Morton v. Mancari,* 1974, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290. In *Mancari,* the Supreme Court held that the Equal Employment Opportunity Act of 1972 had not impliedly repealed provisions of The Indian Reorganization Act of 1934 according an employment preference to Indians for jobs in the Bureau of Indian Affairs. Preference for Indians in the BIA was found to be a part of the longstanding national policy on Indians, just as the agency shop provision is a longstanding part of national labor policy. As stated by the Court: "In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments." 417 U.S. at 551, 94 S.Ct. at 2483, 41 L.Ed.2d at 301.

organization . . . to require as a condition of employment membership therein . . ." No attempt is being made to elevate this proviso into a supremacy clause, "which for all time lifts section 8(a)(3) [29 U.S.C. § 158(a)(3)] above the general level of the United States Code to a position comparable to the Constitution," as the majority asserts. [Typed Opinion, p. 169.] Rather, this proviso indicates the strong policy in seeing that all who receive the benefits of union representation must bear a proportional share of the costs,[5] and that exceptions to this policy shall not be found unless clearly or expressly provided. Indeed, in 1974 when Congress extended coverage of the NLRA to employees of nonprofit hospitals, an express provision amending § 8(a)(3) was adopted to exempt "any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations" from union security agreements. 29 U.S.C. § 169 (1976 Supp.). With deference, I think that the majority is in error when it says [Typed Opinion, p. 169] that this exemption codified at 29 U.S.C. § 169 does not amend § 8(a)(3) of the NLRA. An examination of the legislative history of that Act clearly reveals that the purpose of this provision was to amend § 8(a)(3). See *Legislative History of the Coverage of Non-Profit Hospitals Under the National Labor Relations Act,* 1974 at 200. (Hereinafter *Leg. Hist.*)

If the 1972 amendment to Title VII does require employers to accommodate the religious beliefs of their employees such as these, there would appear to have been no reason for Congress to have provided the exception found at 29 U.S.C. § 169 when it brought the nonprofit health care industry under the NLRA. The EEOC as *amicus curiae* advances the argument that Con-

[5] See S.Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 7 (1947), *quoted in Yott v. North American Rockwell Corporation, supra,* at 400.

gress meant to require further accommodation to religions beyond that required by Title VII at 29 U.S.C. § 169 provides an absolute exemption which is not overcome by a showing of undue hardship on the part of the Union. The legislative history of the 1974 amendment to the NLRA, however, does not support this contention. In neither the Senate debate, the House debate, nor the Joint Explanatory Statement of the Committee Conference was there any mention made of the 1964 Civil Rights Act as amended or its possible application to situations where employees have religious objections to labor organizations. See *Leg.Hist.* 193-211, 298-299, 331-336, 348. Obviously then, neither Senator Dominick[6] nor Representative Erlenborn, nor any other member of Congress, believed that Title VII already provided even a possible exemption to the agency shop provision of the NLRA for religious beliefs.

In *Yott v. North American Rockwell Corporation, supra*, the Ninth Circuit was confronted with a case involving a situation similar to the present one. There, the court reversed the dismissal of plaintiff's complaint and remanded to the district court for a determination of whether a reasonable accommodation without undue hardship could be reached. In a footnote, the court described this remand:

> "Since we hold that if a reasonable accommodation can be reached between the parties it must be offered appellant

[6] Senator Dominick sponsored a proposed amendment to the Senate bill which would allow employees of nonprofit hospitals who have religious objections to labor unions to contribute instead to a nonreligious charity. The Senate, however, tabled this amendment, *Leg. Hist.* 211-212. Interestingly, Senator Javits of New York was the Senator who moved to table this amendment, but was also one of the co-sponsors of the Randolph Amendment to the Equal Employment Opportunity Act of 1972. See 118 Cong.Rec. 705. Senator Javits' outspoken opposition to granting exemptions from union security agreements on religious grounds and his support in 1972 of § 701(j) further indicate that Congress had no intent to provide for such an exception when it passed the Equal Employment Opportunity Act in 1972.

> Yott and such determination is for the District Court on remand (*infra*), we leave analysis of whether the 'business necessity' test would be met for the District Court's determination. We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. 'Free riders' are discouraged. In effect stability is promoted by reducing potential labor strife, thus increasing the efficient operation of the business." 501 F.2d at 402 n. 6.

Curiously, the court described the "undue hardship" analysis as a "business necessity" test and went on to suggest to the district court that a union security agreement does meet such a test.[7] I am in basic agreement with this, but conceptualize the issue somewhat differently. To my way of thinking, the "undue hardship" analysis has no application at all to the union security agreement. Briefly stated, I would remand to the district court for the limited purpose of determining whether accommodations such as a transfer of these employees to an open shop can be made without undue hardship; and would direct that in no event should the district court extend the scope of accommodation to provide an exemption from the payment of dues under an agency shop agreement.

[7] See also 501 F.2d at 400-401 n. 4 ("It is for Congress, which authorized union security clauses, not the judiciary, to carve out exceptions to those clauses.")

DISTRICT COURT'S OPINION

Howard Cooper, et al.,

Plaintiffs,

v.

General Dynamics, Convair Aerospace Division, Fort Worth Operation, et al.,

Defendants.

Civ. A. No. CA-4-2157

United States District Court
N.D. Texas
Fort Worth Division

July 26, 1974

Joseph A. Jenkins, Dallas, Tex., for plaintiffs.

J. Olcott Phillips, Fort Worth, Tex., Otto B. Mullinax, Dallas, Tex., Sam Houston Clinton, Jr., Austin, Tex., for defendants.

MEMORANDUM OPINION

Robert M. Hill, District Judge.

This suit arises from the fact that the plaintiffs, Howard Cooper, Rita Kimbell and Howard T. Hopkins, are members of a religious organization known as the Seventh Day Adventist and are also employees of defendant General Dynamics, a Texas corporation, who has entered into a union security agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO, and its local union, District Lodge No. 776. The union security agreement provides that all employees within the collective bargaining unit must authorize a payroll deduction for, or pay directly to the union, monies equal to

the dues and initiation fees of the union as a condition of continued employment with General Dynamics.

The plaintiffs challenge the union security agreement on two grounds. First, it is alleged that the union security agreement is repugnant to the Union Security Act of 1951 and the Texas Right to Work Act. Second, it is alleged that the union security agreement discriminates against the plaintiffs in the exercise of their religious practice and observance by being required to financially support a union. Jurisdiction is conferred upon this court by 28 U.S.C. §§ 1331, 1343, 1441 and 42 U.S.C. § 2000e-5(f).

I. *The Seventh Day Adventist Church*

The Seventh Day Adventist Church is a religious organization with about 500,000 members in the United States and about 2½ million in the world. This church has taken the position for the past 75 years that its members should not join or financially support labor unions and professional associations. This position is based on the belief that a church member must love his neighbor as himself and that since a church member's employer is his neighbor he cannot join in such activities of a labor union such as strikes and picketing without violating the commandment to love his neighbor. Additionally, it is the teaching of the Seventh Day Adventist Church that when a church member does join or contribute to a labor organization he places his immortal soul in jeopardy and denies himself of a chance for eternal life and salvation.

The defendants have challenged the religious sincerity of the plaintiffs Kimball and Hopkins. However, after considering the evidence, this court finds that all of the plaintiffs are sincere in their religious convictions and are now conscientiously committed to their church's position that its members should not be-

long to or contribute financial support to a labor organization. Kimball and Hopkins were at one time members of the defendant union but they testified that at the time they were members of the defendant union they were not fully aware of the religious implications of their membership in a labor union and that, after being counseled by the church and having studied the church's teachings, they discovered that being a member of a union was not compatible with the teachings of the Seventh Day Adventist Church.

II. *The Violation of State Law Claim*

[1] Count I of the plaintiffs' amended complaint challenges the validity of the union security agreement which was negotiated between General Dynamics and the international and local unions which represent the bargaining unit of which plaintiffs are members. It is argued that the union security agreement violates § 14(b) of the National Labor Relations Act and the Texas Right to Work Act of 1947. Section 14(b) reserves to the states the power to police agreements made within the state requiring membership in a labor organization. Pursuant to this federal statute, the Texas legislature enacted the Right to Work Act of 1947, Vernon's Ann. Tex.Rev.Civ.Stat. art. 5207a (1971), which prohibits membership in a labor organization as a condition of employment.[1] None of the defendants deny

[1] An agency shop is a union security agreement which does not obligate an employee to become a member of a labor union or to participate in any union activities, but only requires that he pay an agency fee, usually the equivalent of the union dues, in return for the collective bargaining services which the union renders on behalf of the employees. A closed or union shop is a union security agreement which obligates an employee as a condition of employment to become a member of a labor union and to participate in all union activities. An open shop agreement permits voluntary union membership and participation but does not require the payment of any fees or dues to the union as a condition of employment. Tex.Rev.Civ. Stat. art. 5207a (1971) prohibits both the agency and closed shops in Texas.

that the union security agreement is an agency shop in violation of article 5207a, but it is asserted by the defendants the agreement is enforceable and controls employment activities on a federal enclave and thus is subject to and controlled exclusively by federal law which permits agency shop agreements. 29 U.S.C. § 151 et seq. A federal enclave is a territory which has been transferred by a state through consent or cession to the United States who then acquires exclusive jurisdiction over all activities within the area. U.S.Const., Art.1, § 8, cl. 17.

It is clear from all the evidence that the General Dynamic's plant in which the plaintiffs are employed is located on a federal enclave which was created in 1942 when the State of Texas ceded jurisdiction and conveyed the land to the United States of America. Validity of this federal enclave was judicially determined by a Texas court in Board of Equalization v. General Dynamics Corp., 344 S.W.2d 489 (Tex.Civ.App.—Fort Worth 1961 writ ref'd n. r. e.), where it was held that the property had been ceded to the federal government and that a city and school district had no authority to levy taxes on the property. Moreover, the Supreme Court has recently upheld the exclusive nature of the federal jurisdiction and right of control of a federal enclave. In United States v. State Tax Commission of Mississippi, 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973) the Court invalidated the attempt of a state tax commission to force collection and remittance of liquor sales markups from military installations located on land within the State but owned and controlled by the federal government. The Court held that the federal enclave was to the state the same as a territory or another state which no longer constituted a part of that state and did not function under its control.

[2, 3] At trial the testimony and evidence revealed that each of the plaintiffs were hired, work on and are paid on this federal enclave and that the union security agreement in dispute applies to, is enforced and is performed on the enclave. The fact that

the union security agreement was ratified and negotiated off the federal enclave dose not void its application since the state laws which the plaintiffs have relied on do not by their very terms undertake to proscribe contract negotiations leading to an agency shop but only the end product of those negotiations—the enforcement and application of an agency shop agreement. Thus this court concludes that since the union security agreement is enforced on and controls employment activities on a federal enclave, then that agreement should be subject to and controlled exclusively by federal law rather than state law. Pacific Coast Dairy, Inc. v. Department of Agriculture, 318 U.S. 285, 63 S. Ct. 628, 87 L.Ed. 761 (1943); Surplus Trading v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1933). Under federal law the union security agreement is valid pursuant to the terms of National Labor Relations Act, 29 U.S.C. § 151 et seq.; Gray v. Gulf, Mobile & Ohio Railroad Co., 429 F.2d 1064 (5th Cir. 1970), cert. denied 400 U.S. 1001, 91 S.Ct. 461, 27 L.Ed.2d 451 (1971).

III. *Title VII Claim*

Plaintiffs' second challenge to the union security agreement is that it discriminates against them in the exercise of their religious practices and observances as defined in § 701(j) of the Civil Rights Act of 1964 and as amended by the Equal Employment Opportunity Act of 1972. 42 U.S.C. 2000e-5(f). Plaintiffs have complied with the administrative requirements of the Act by filing a charge of employment discrimination with Equal Employment Opportunity Commission (EEOC) and there was an attempt to conciliate the issue that the defendants discriminated against the plaintiffs in the exercise of their religious practices and observances. The defendants urge that the Title VII claim is premature since the Equal Employment Opportunity Commission has yet to issue a notice to sue. The district director has issued a notice to sue but it is asserted that he is without statutory authority to make a determination of employment discrimination or to issue a notice to sue. The defendants also urge that the plaintiffs should first exhaust the union grievance procedure before they pursue their claims in federal court.

[4, 5] The fact that the deputy director of the EEOC issued the notice to sue rather than the commission is of no significance to this court's jurisdiction since the commission could properly delegate this clerical task to any of its subordinates. Stone v. EDS Corp., 351 F.Supp. 340 (N.D.Cal.1972). Moreover the court is of the opinion that the plaintiffs need not first exhaust the union grievance procedure before pursuing their Title VII claim. Plaintiffs are not asserting any contractual rights as the basis for this action, but are asserting a statutory right against religious discrimination and therefore they need only to comply with the procedures for relief provided in that statute. King v. Georgia Power Co., 295 F.Supp. 943 (N.D.Ga.1968); Dent v. St. Louis-San Francisco, 265 F.Supp. 56 (N.D.Ala.1967) rev'vsd on other grounds, 406 F.2d 399 (5th Cir. 1969); *see*, Alexander v. Gardner Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

[6, 7] Having considered the merits of plaintiffs' Title VII claim, this court is of the opinion the union security agreement in dispute does not discriminate against the plaintiffs in the exercise of their religious beliefs and observances. The union dues exacted from the plaintiffs are merely a "tax" to support the collective bargaining activities from which the plaintiffs have obviously benefited. Railway Employee's Department, AFL v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). Moreover, plaintiffs have not been asked to subscribe to any tenets or doctrines of unionism or to engage in any strikes or violence against their employers. They have merely been requested to pay their share of the cost of the collective bargaining which has resulted in direct financial

benefits and job security to them. Gray v. Gulf, Mobile & Ohio Railroad Co., 429 F.2d 1064 (5th Cir. 1970), cert. denied 400 U.S. 1001, 91 S.Ct. 461, 27 L.Ed.2d 451 (1971). To urge that by paying the equivalent of union dues they are supporting violence against their neighbors is as specious as urging that the plaintiffs contribute to violence against their neighbors by performing their occupational task—the assembly and manufacture of component parts to military fighter aircraft.[2] This court being of the opinion that there being no conflict between the plaintiffs' religious beliefs and the union security agreement, it is thus unnecessary for this court to direct General Dynamics to accommodate the plaintiffs by exempting them from paying their share of the cost of the collective bargaining activities under the union security agreement.

IV. *General Dynamics' Indemnity Claim*

General Dynamics has also filed a cross claim against the defendant unions for reasonable attorney's fees incurred by General Dynamics because of plaintiff's claims challenging the union security agreement. The basis for this claim is § 11 of article two of the agreement which provides that the defendant unions

> ". . . will defend, save, hold harmless and indemnify the Company from any and all claims, demands, suits or any other forms of liability that shall arise out of the execution, placing in effect or carrying out of the terms of this Article by the Company."

Article two is the union security article which established the agency shop challenged by the plaintiffs.

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[2] Moreover, it could be argued that the union security agreement promotes industrial harmony and lessens the possibility of violence by providing an orderly procedure of resolving any disputes between an employer and its employees.

[8, 9] As a general rule, unless an indemnity provision provides otherwise, an indemnitee is entitled to recover against the indemnitor reasonable attorney's fees and expenses incurred in defending the indemnified claim. A. C. Israel Commodity Co., Inc. v. American West African Line, 397 F.2d 170 (3d Cir. 1968, cert. denied, 393 U.S. 978, 89 S.Ct. 446, 21 L.Ed. 2d 439 (1969); Garcia v. Sky Climber, Inc., 470 S.W.2d 261 (Tex.Civ.App.—Houston [1st Dist.] 1971 writ ref'd n.r.e.). Having given notice of its intent to hold the indemnitor liable by filing a cross action against the defendant unions, General Dynamics is thus entitled to recover $7,500 for attorney fees and expenses incurred by General Dynamics in defending this cause of action. These fees and expenses are fair and reasonable and were necessarily incurred by General Dynamics in defense of this suit.

V. *Conclusion*

The foregoing shall constitute this court's findings of fact and conclusions of law. The defendants are hereby ordered to submit to this court a judgment, approved as to form by the plaintiffs, and consistent with the foregoing.

ESSEX DISTRICT COURT OPINION

United States of America
In the District Court of the United States
For the Western District of Michigan
Southern Division

(Filed January 13, 1976)

K74-288 C.A.

Doris McDaniel,
Plaintiff,

v.

Essex International, Inc., aka Essex Wire, a Michigan Corporation, and International Association of Machinists, Local Lodge No. 982,
Defendants.

Opinion

Plaintiff Doris McDaniel brought suit against her employer, Essex International, Inc., and the union which, under the National Labor Relations Act, represented employees in the bargaining unit in which plaintiff accepted employment at Essex on October 15, 1972. In her suit, plaintiff, a member of the Seventh-Day Adventist Church, claimed that the union's enforcement of a "union shop" agreement with Essex violated plaintiff's rights under the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended, and the Constitution and Fair Employment Practices Act of the State of Michigan. After considering plaintiff's complaint and the exhibits filed with her brief in opposition to defendants' motion

to dismiss, this court concludes that as a matter of law, plaintiff has failed to state a claim upon which relief may be granted.

When plaintiff accepted employment at Essex, the company and Local Lodge 982 of the International Association of Machinists and Aerospace Workers had a collective bargaining agreement in effect which contained a union security agreement authorized by Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§ 152(a)(3), (b)(2). That agreement provided that all employees represented by Local 982, as a condition of continued employment, had to become a member of the union within forty-five days of hire. If an employee failed to abide by that agreement, the company had to discharge that employee within three days of a request by the union. Plaintiff, because of her religious beliefs, refused to pay her full dues to the union, offering instead to pay an amount equivalent to her periodic union dues to a non-religious charity. Local 982 declined that offer. After being warned of the consequences of her continued refusal, plaintiff persisted in her refusal to pay the full dues and was discharged on December 28, 1972. Plaintiff was not required to join the union nor was she asked to adopt its ideological principles.

While plaintiff has based her constitutional challenge on several amendments to the Federal Constitution, only plaintiff's First Amendment challenge merits discussion. An identical argument based upon the First Amendment's protection of the free exercise of one's religion was made and rejected in Hammond v. United Paperworkers Union, 462 F.2d 174 (6th Cir.), cert. denied, 409 U.S. 1028 (1972). In Hammond, this court rejected a challenge by a member of the Seventh-Day Adventist Church to the enforcement of a union shop agreement because, upon balance, the strong governmental interest in authorizing union shop agreements was found to be compelling and controlling over the right of the individual to the free exercise of religious beliefs. That conclusion was affirmed on appeal. That

same balancing of competing interests requires that plaintiff's First Amendment claim be dismissed.

Since unions have the duty to represent all members of their bargaining unit regardless of their union affiliation, Steele v. Louisville & N.R.R., 323 U.S. 192, 201-02 (1944), Congress concluded that *all* members of the bargaining unit should pay their "fair share" of the costs of securing benefits for, and of representing members of that bargaining unit. Railway Employees' Dept. v. Hanson, 351 U.S. 225, 231 (1956). Besides eliminating "free riders," the requirement that all employees represented by a union pay dues to that union serves the important purpose of counterbalancing the economic power of the corporate structure, and of removing the disruptive effects of union members being required to share their achievements. See, Linscott v. Millers Falls Co., 440 F.2d 14, 18 n.3 (1st Cir.), cert. denied, 404 U.S. 872 (1971). All of those purposes of union shop agreements serve the valid Congressional interest in promoting industrial peace along the arteries of commerce. International Assoc. of Machinists v. Street, 367 U.S. 740 (1961); cf., United States v. Lowden, 308 U.S. 225 (1939). But mindful of the interests of the individual employees, Congress did not authorize a complete form of union shop. It "whittled down [the 'membership' requirement] to its financial core"[1] by permitting enforcement of a union shop agreement only to require employees to pay dues to the union. See, NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975). Union dues required under a union shop agreement, thus, "simply constitute a 'tax' in support of the collective bargaining efforts of the union." Gray v. Gulf, M. & O. R.R., 429 F.2d 1064, 1072 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971). Consequently, any infringement upon an individual's free exercise of her religion is limited and must be subordinate to the compelling governmental interest in favor of such a tax.

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[1] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

Plaintiff's addition of a claim under Title VII of the Civil Rights Act of 1964, as amended, does not require a different result. Union shop agreements and their even-handed enforcement serve a necessary "business purpose" of unions. Requiring a union to waive its right to have all pay their "fair share" would be an undue hardship upon the union and its other members. Moreover, the "accommodation" required by Section 701 (j), 42 U.S.C. § 2000e(j), is the same as that required under the First Amendment by the balancing of interests test used in Hammond. Congress effected the reasonable accommodation required by Title VII when it balanced the competing interests in enacting the union shop provisions of the Taft-Hartley Act of 1947. 29 U.S.C. §§ 158(a)(3), (b)(2).[2]

Since defendants are entitled to judgment on the merits as a matter of law, their motions in the nature of motions for summary judgment will be granted.

Dated: January 13th, 1976.

/s/ Noel P. Fox
Chief District Judge

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[2] Plaintiff's claim under the laws of the State of Michigan must also fail for those laws parallel both the U.S. Constitution and Title VII. Since plaintiff has failed to state a claim under federal constitutional or statutory law, she has also failed to state a claim under the Michigan Constitution and Fair Employment Practices Act.

Opinion Denying Motion for Rehearing and Partially Modifying the Judgment

On January 13, 1976, this court issued an opinion and order granting summary judgment to defendants in a suit alleging religious discrimination in the collection of union dues pursuant to a "union shop" agreement. Plaintiff filed a timely motion for rehearing, assigning numerous errors. In addition, the United States Equal Employment Opportunity Commission requested leave to file a brief as *amicus curiae*.

After carefully reviewing the plaintiff's motion and supporting memoranda, this court concludes that no useful purpose would be served by granting a rehearing. With the single exception noted below, the court reaffirms its original ruling. The motion of the EEOC for leave to file an *amicus* brief is denied; the agency's views can more appropriately be addressed, at this juncture, to the Court of Appeals.

In light of plaintiff's arguments, the court has reconsidered its disposition of the pendent state claims. Accordingly, the original judgment is modified by deletion of footnote 2 from page 4 of the opinion. Since relief has been denied on the federal claim, and since the pendent claim concerns unresolved questions of state law, this court declines to exercise its jurisdiction over the state claim, and makes no ruling on the merits of that issue. The judgment entered January 13, 1976 is otherwise unaltered.

IT IS SO ORDERED.

Dated: March 15, 1976.

/s/ NOEL P. FOX
Chief U. S. District Judge

BURNS DISTRICT COURT OPINION

In the United States District Court
For the District of Arizona

Duane Terrell Burns,
Plaintiff,
vs.
Southern Pacific Transportation Company, United Transportation Union, and United Transportation Union Local No. 807,
Defendants.

No. Civ. 74-35 Tuc. (JAW)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been heretofore tried to the court, sitting without a jury, and the court having heard and considered the evidence and considered the stipulations of the parties, the court now finds the facts and states separately its conclusions of law as follows:

Findings of Fact

1. Plaintiff, Duane Terrell Burns, a railroad trainman and a resident of Tucson, Arizona, has been employed by defendant Southern Pacific Transportation Company (hereinafter "Southern Pacific") in the capacities of brakeman or conductor since 1955. (R.T. 131).

2. Defendant United Transportation Union (hereinafter "UTU") is a labor organization national in scope which is certified to represent for collective bargaining purposes on Southern Pacific, the crafts of brakemen and conductors in which plaintiff is employed. (Pretrial Order, p. 2).

3. Defendant Southern Pacific is a common carrier by railroad engaged in the transportation of freight in interstate commerce. (R.T. 285, 299).

4. Defendant United Transportation Union, Local 807 (hereinafter "Local 807") is responsible for supervising the application and administration in the operations of Southern Pacific, in and extending from Tucson, of collective bargaining agreements negotiated by the parent organization, UTU, through its respective general committees. (R.T. 257).

5. Plaintiff is a "person" within the meaning of 42 U.S.C., § 2000e(a) and is an employee of Southern Pacific, an "employer" within the meaning of 42 U.S.C., § 2000e(b). UTU and Local 807 are "labor organizations" within the meaning of 42 U.S.C., § 2000e(d). Plaintiff is subject to membership in UTU and Local 807 by virtue of 45 U.S.C., §§ 151, et seq.

6. Prior to plaintiff's employment with Southern Pacific, the predecessor of UTU and Southern Pacific negotiated a Union Security Agreement which provides in pertinent part, as follows:

> "All employees . . . shall, as a condition of continued employment . . . within sixty days following the establishment of . . . seniority . . . become members of and thereafter maintain membership in good standing in, the organization* . . .". (Joint Exhibits 1 and 5).

7. A companion agreement between the predecessor of UTU and Southern Pacific, executed contemporaneously with the agreement quoted in Paragraph 6, spura, provided the following accommodation to religious objectors:

> "In the application of the Union Shop Agreement . . . any employee *in service on the date of this agreement* who is not a member of the union representing his craft

* Now UTU.

> or class . . . and [who] will make affidavit [that] he was a member of a bona fide religious group, on the date of this agreement, having scruples against joining a union will . . . be deemed to have met the requirements of the Union Shop Agreement if he agrees to and does pay initiation fees, periodic dues and assessments of the organization* representing his craft or class signatory hereto." (Joint Exhibits 3 and 6. Emphasis added).

8. Plaintiff, on being employed by Southern Pacific, became an active member of the predecessor of UTU and its Local 807 and subsequently was elected to the office of Local Chairman. (R.T. pp. 135, 136).

9. On November 21, 1970, plaintiff joined the Seventh-day Adventist Church and on February 26, 1974, resigned his membership in UTU and in Local 807 and refused to again tender to the Union periodic dues and assessments as required by the Union Security Agreement. (R.T. 135, 136; PX 17 in Evidence).

10. Plaintiff's reason for his severance of all connections with the Union lies in his religious convictions against membership in unions and financial support thereof. (R.T. 138, 144). He contends that the Union Security Agreement violates his rights under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States and constitutes religious discrimination in violation of the Civil Rights Act of 1964, as amended in 1972. 42 U.S.C., §§ 2000e(j) and 2000e-2(a)(1). (Plaintiff's Complaint).

11. Plaintiff filed charges of religious discrimination with the Equal Employment Opportunity Commission, at Phoenix, Arizona, on November 21, 1973, in compliance with Section

* Now UTU.

706(e) of the Equal Employment Opportunity Act of 1972. No conciliation having been effectuated and upon plaintiff's request, the Commission issued to plaintiff on January 25, 1974, its Notice of Right to Sue with respect to defendant Southern Pacific and defendant Local 807; and on February 20, 1974, the Commission issued its Notice of Right to Sue with respect to defendant UTU. Plaintiff filed this action on March 1, 1974. (Pretrial Order, p. 3).

12. It is a basic tenet held and taught by the Seventh-day Adventist Church for many years that it is a violation of God's teaching for its members who have matured in their beliefs to either join or support a labor organization. Plaintiff sincerely holds the belief that he should not be a member or financially support a labor organization; and plaintiff sincerely holds the belief, further, that his payment of monies to UTU would be a violation of his religious convictions and would jeopardize his eternal salvation. (Plaintiff's Brief, File Document 39, pp. 4 through 10).

13. Both UTU and Southern Pacific have agreed to accommodate plaintiff's religious beliefs by waiving any requirement of the Union Security Agreement that plaintiff be or remain a member of the Union or participate in any Union activity, if he will pay to the Union, through the medium of periodic dues and assessment, his fair share of the costs of collective bargaining. (R.T. 164, 165).

14. The collective bargaining efforts of UTU have resulted in substantial employment benefits to the plaintiff in the form of high wages, job protection, security and promotional opportunity, health care, safer working conditions, retirement pay, and other incidental employment benefits, all of which are available to every employee in crafts represented by UTU, regardless of race, religion, national origin or sex. (R.T., pp. 153-156, 218-229).

15. UTU, in addition to its responsibility under the Railway Labor Act for the negotiation of collective bargaining agreements, also has the duty to administer and enforce those agreements on a virtually continuous basis. (R.T. pp. 212-217, 230-237). In fulfillment of this function, elected officials of UTU and its locals represent employees who are disciplined or discharged in administrative hearings on the various railroad properties, before the National Railroad Adjustment Board and before various Public Law Boards created pursuant to the Railway Labor Act. (R.T. pp. 225, 230-233).

16. The representative efforts of UTU within the framework of the Railway Labor Act and its processes contribute substantially to the fulfillment of the primary objective of that legislation, i.e., to promote industrial peace and to secure the uninterrupted flow of interstate commerce. (R.T. pp. 213-217).

17. The representative efforts of UTU to achieve the aforementioned purposes of the Railway Labor Act and to secure to the members of its represented crafts the substantial benefits which they now enjoy in wages, working conditions, job security, and health and retirement benefits requires the expenditure of large sums of money to pay the salaries and expenses of and to train, support and maintain the necessary complement of full and part-time union representatives and their supporting staffs. It is further necessary for the union to purchase or rent and maintain some office buildings, many offices, and much office equipment and supplies. (R.T. pp. 230-236, 239-241).

18. In order to obtain the necessary funds to fulfill its legislative purposes under the Railway Labor Act and to fully and fairly represent all employees which it is certified to represent, it is necessary to assess and collect from these employees an amount equal to their fair share of the collective bargaining expense. These assessments are made in the form of and are called periodic union dues and assessments. (R.T. pp. 241, 242).

19. The Seventh-day Adventist Church is worldwide in its scope, with approximately one-half million members in the United States. (R.T. p. 28). In Local 807, one percent of the members belong to the Seventh-day Adventist Church. (R.T. pp. 258, 276).

20. Witness Melvin Adams, a high official in and an ordained minister of the Seventh-day Adventist Church, testified as an expert in behalf of the plaintiff. His testimony established that disproportionately high numbers of Seventh-day Adventists enter employment areas which provide union-free employment and that if union security agreements in the railroad industry were not enforced against Seventh-day Adventists, this industry would provide an attractive employment opportunity for the members of that faith, particularly in view of the formidable growth of unions in fields that have in the past been union-free. (R.T. pp. 66,69).

21. If plaintiff's contentions herein are sustained, it is very likely that additional Seventh-day Adventists and other employees in the railroad industry with similar beliefs[1] would, on the basis of the decision herein refuse to pay dues or assessments to the Union. Further, it is very likely that many other persons holding such beliefs would seek and obtain employment in the railroad industry because of the relatively high wages and other benefits enjoyed by railroad employees. These developments would result in substantial financial hardship to defendant UTU.

22. Plaintiff testified (R.T. pp. 150-152) that he stood ready, so long as he remained an employee of Southern Pacific, to pay monies equal to UTU dues and assessments (and in lieu of payment thereof), to a designated charity (non-religious and non-union affiliated); and to furnish to UTU proof of each and every

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[1] See: *Wicks v. Southern Pacific Company*, 231 F.2d 130, at p. 132, f.n. 2.

payment so made.[2] However, if the accommodation suggested by plaintiff were to be really operable in cases of employees having a conscientious objection to joining or financially supporting labor organizations, in order to keep peace and harmony between union members and Southern Pacific undoubtedly more would be required than proof of payment of the charitable contributions. For example, in order that Southern Pacific, or UTU, for that matter, would be able to assure employees paying union dues and assessments that employees in Burns' situation were not "free riding", more would be required than having the receipts for charitable donations produced and examined. Investigation and checking would be required in order to determine for each employee in Burns' situation the amount of his charitable contributions in the years immediately prior to his discontinuing payment of union dues and assessments. In addition, Southern Pacific and UTU would have to do the investigation and checking necessary to be certain that the annual charitable contributions of each employee in Burns' situation, after discontinuing payment of union dues and assessments, equaled the total of his annual charitable contributions and union dues and assessments before discontinuing payment of such dues and assessments. This burden, and likely others not presently apparent, would be cast upon Southern Pacific or UTU, or both, would require considerable time, effort and expense, and would impose undue hardship on Southern Pacific and UTU.

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[2] Burns testified, also, that to implement this offer he had established a Trust (PX 18 in evidence) and paid into it an amount equal to the amount of union dues and assessments he would have paid had he remained a member of UTU. However, examination of the Trust Agreement discloses that the Trustee is plaintiff's church; the Agreement requires (a) that the cash held in the Trust be invested to earn at least 5% per annum, (b) that the specified (5%) rate be paid to Burns annually, (c) that all earnings from the cash in excess of 5% shall be retained by the Trustee, (d) that in certain circumstances both principal and income of the Trust may be used for support of plaintiff, and (e) that in the event of plaintiff's death the assets remaining in the Trust are to pass to plaintiff's designated heirs. In light of the terms and provisions of the Trust, it is evident that there is no certainty that any monies now in the Trust will ever pass to a non-religious charity.

23. The employee hostility, dissension, friction, and consequent loss of operating efficiency and safety which would result if plaintiff were to receive the benefits of collective bargaining without paying his fair share of its costs would undoubtedly result in undue hardship on Southern Pacific. (R.T. 289-291). The operation of railroad trains, involving as it does assembling, switching, and moving at high speeds large consists of railroad cars requires a team effort if it is to be efficient and safe. (R.T. 264-266). The testimony of both management and union witnesses, based on experience, established that the hostility generated by the "no bill" or "free riders" has a substantially adverse impact on such safety and efficiency. Witness Carl Ball, Vice-President of Operations for Southern Pacific, testified from an experience of thirty-nine years in the field that, in his opinion, the failure to require plaintiff to pay his fair share of the collective bargaining costs would cause significant employee hostility, dissension, and lack of communication, resulting in undue hardship to Southern Pacific in the form of reduced operational efficiency and safety. (R.T. pp. 287, 200-292, 311-315). Mr. Ball's opinion appears quite sound when consideration is given to the fact that Burns fellow workers could very well be expected to have difficulty in accepting Burns' sincerity in being unable in conscience to pay union dues and assessments while he was able to accept the benefits he shares with his fellow workmen, made possible by their payment of union dues and assessments.

24. UTU Vice-President George Legge testified, based on more than thirty years experience in the railroad industry, that free-rider problems were serious enough on occasions to cause brother to be pitted against brother and father against son. He testified that employee reactions included refusal of union members to speak to non-union members, union members bidding off assignment to avoid working with non-members, and other conduct resulting in inefficiency of operations. (R.T. pp. 244, 245). Chairman Dan Johnson of Local 807 testified that employee reaction to plaintiff's failure to pay union dues and

assessments[3] was belligerance, hostility, threats of refusal to work with plaintiff, and threats of refusal to pay dues to the Union if Burns is not required to do so. (R.T. pp. 264-266, 273, 274, 277-281).

Conclusions of Law

1. This Court has jurisdiction of this action and of the parties thereto.

2. The requirement that plaintiff tender periodic union dues and assessments as required by the Union Security Agreement negotiated by the defendants United Transportation Union and Southern Pacific Transportation Company pursuant to the Congressional authorization in Section 2, *Eleventh* of the Railway Labor Act does not violate plaintiff's rights under the *First*, *Fifth*, *Ninth*, or *Fourteenth* Amendments to the Constitution of the United States. *Railway Employees v. Hanson*, 351 U.S. 225 (1955); *Machinists Union v. Street*, 367 U.S. 740 (1961); *Yott v. North American Rockwell*, 501 F.2d 398 (9 Cir. 1974); 45 U.S.C., § 152, *Eleventh*.

3. Neither the Civil Rights Act of 1964 nor the 1972 amendments thereto operated to repeal, in whole or in part, or to modify Section 2, *Eleventh* of the Railway Labor Act authorizing the Union Security Agreement in question. *Yott v. North American Rockwell*, 501 F.2d 398 (9 Cir. 1974).

4. In enacting the Railway Labor Act, Congress was motivated by these legislative findings: Collective bargaining is more costly to a railroad from a monetary standpoint than such bargaining when conducted in any other industry. The administrative machinery involved is more complete and more complex.

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[3] The employees consulted by Johnson were advised that Burns would pay to a charity of UTU's choice an amount equal to union dues and assessments.

The mediation, arbitration, and Presidential Emergency Board provisions of the Railway Labor Act, while greatly in the public interest, are very costly to the Union. The handling of disputes through the National Railroad Adjustment Board also requires expenses which are not experienced by unions in other industries. *Machinists Union v. Street*, 367 U.S. 740, 761-762.

5. Congress enacted Section 2, *Eleventh* of the Railway Labor Act in response to the problems and unrest created by the employee who received the benefits of collective bargaining while failing to pay his fair share of the cost thereof. *Machinists Union v. Street*, 367 U.S. 740, 763 (1961).

6. The Union Shop provisions of the Railway Labor Act represent an exercise by Congress of its power under the commerce clause to promote peaceful industrial relations in the functioning of interstate railroads and thereby further the national well-being. *Railway Employees' v. Hanson*, 351 U.S. 225 (1955).

7. Defendants UTU and Southern Pacific have offered a reasonable accommodation to plaintiff's religious beliefs by agreeing to waive any requirement that he remain a member of the Union or participate in any union activities so long as he continues to tender periodic dues and assessments as required by the Union Security Agreement. *Cooper v. General Dynamics*, 378 F. Supp. 1258, 1262.

8. The granting to plaintiff of the relief he requests in this action would, in light of Findings 21, 22, 23, and 24, supra, constitute "undue hardship" on Southern Pacific and UTU.

9. Defendants are entitled to judgment herein that plaintiff take nothing by his complaint, that this action be dismissed, and that defendants have their costs herein.

Dated: January 8, 1976.

James A. Walsh
United States District Judge

Rcvd
AUG 11 1976

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK
TEL. 504 589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

August 9, 1976

TO ALL COUNSEL OF RECORD

No. 74-3151 - Cooper, ET AL.; Imbell and Hopkins v. General Dynamics, ET AL. v. International Association of Machinists, etc., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Lora M. Bramwell
Deputy Clerk

/smg

cc: Mr. David Watkins
Messrs. Richard S. Cohen
Charles L. Reischel
Mr. Louis A. Jacobs
Mr. J. Olcott Phillips
Messrs. Otto B. Mullinax
L. N. D. Wells, Jr.
Mr. Sam Houston Clinton, Jr.

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-537

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.,

Petitioners,

v.

HOWARD HOPKINS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID WATKINS
1212 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247
Attorney for Respondents

Of Counsel:
JENKINS & WATKINS, INC.
1212 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247

JOHNS & CARSON
6930 Carroll Avenue
Washington, D.C. 20012

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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LIST OF AUTHORITIES CITED

List of Authorities—(Continued)

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Howard Hopkins and Rita Kimball (Coleman) (hereinafter referred to collectively as "Respondents"), hereby files their opposition to granting the Writ of Certiorari in the above captioned matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 533 F2d 163 and reproduced in Petitioner's Application (Pet. App.) pages A-1 thru A-27. The memorandum opinion of the United States District Court for the Northern District of Texas (Pet. App. A-28 thru A-35) is reported at 378 F.Supp. 1258.

JURISDICTION

The Court of Appeals denied rehearing on August 9, 1976. The petition for writ of certiorari was filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Do the provisions of the Civil Rights Act of 1964[1] and of the Equal Employment Opportunity Act of 1972,[2] when harmonized with the union security provisions of the Labor Management Relations Act of 1947 (Taft-Hartley),[3] require accommodation to an employee's religious beliefs.[4]

STATUTORY PROVISIONS INVOLVED

The relevant portion of all the Acts are set forth in the petition.

COUNTER-STATEMENT OF THE CASE

Howard Hopkins and Rita Kimbell (Coleman)[5] brought suit for injunctive relief to prevent their discharge under an agency shop provision of a collective bargaining agreement between the petitioning unions and their employer, General Dynamics.

[1] 42 USC 2000e-2

[2] 42 USC 2000e(j)

[3] 29 USC 158(a)(3); (b)(2)

[4] As pointed out by Petitioners, the question of whether 701(j) covers charity-substitution (union security) cases such as this one, or only Sabbatarian-type cases, is necessarily a part of the determination.

[5] This case was initially styled *Cooper, et al vs. General Dynamics, et al.* Howard Cooper was non-suited for medical reasons at the Trial Court level.

Respondents are employed at General Dynamics, Convair Aerospace Division, and former members of the International Association of Machinists.[6] The unions have for many years represented a production and maintenance collective bargaining unit at General Dynamics of which Respondents are a part. Respondent Kimbell (Coleman) has been employed at General Dynamics since 1950 where she has worked in many capacities. She joined the union in 1953 and remained a member for approximately 8 years. She withdrew membership from the union and ceased paying monies in 1961 because of her religious belief that to be a member of or pay monies to a union violated the teachings of her God.

Respondent Hopkins has been employed at General Dynamics since 1946, where he is presently a quality control analyst. He became a member of the IAM in 1950 and remained a member until 1967. He withdrew membership from the union by letter of March 17, 1967, stating that it was for religious reasons that he could no longer be a member of or pay monies to a labor organization.

Both Respondents are over sixty (60) years of age and have at least twenty-five (25) years tenure with General Dynamics. They are also members of the Seventh-Day Adventist Church, a religious organization with 500,000 members in the United States and about two and one-half million members in the world. For at least the last 75 years, the Church has taught its members that they should not join or financially support labor unions. When a Church member, once he understands the Church's doctrine, contributes money to a labor organization he places his soul in jeopardy and denies himself a chance for eternal life and salvation. Respondent Kimbell (Coleman) joined the Church in 1945 in New Mexico and has been a member of the Church in Ft. Worth, Texas since 1950. Respondent Hopkins has been a member of the same local Church since 1954. As the Trial Court

[6] Respondent adopts Petitioner's footnote that both the International Association Machinists and International Association Machinists District Lodge 776 are referred to collectively as "IAM" or sometimes as "Union".

found, both of these Respondents are sincere in their religious beliefs that they should not be a member of or pay monies to a labor organization. These beliefs are based upon their reading of the Bible, the teachings of the Church and the Spirit of Prophecy, the writings of Ellen G. White who is accepted as a prophetess by the Church.

In September, 1972, the IAM for the first time sought and obtained an agency shop provision in the collective bargaining agreement requiring the payment of monies to the union equal to its regular dues and initiation fees as a condition of continued employment. Respondents were advised that they would be discharged because they would not pay monies to the union in violation of their religious beliefs. They brought this suit to prevent their dismissal after over a quarter of a century of service to their employer, and they have established trust funds as temporary coffers of monies equal to their union dues to be paid to a designated charity.

The trial court ordered the case dismissed by finding that there was no conflict between the Respondents' religious beliefs and the agency shop agreement which authorized their discharge (Pet. App. A-34). Thus, the trial court never reached the question presented herein for review, the interplay between 701(j) and 8(a)(3).

The union on appeal before the Fifth Circuit supported the trial court's dismissal on essentially three grounds 1) Section 701(j) does not amend or modify the provisions of 8(a)(3) 2) if Section 701(j) is read to harmonize with 8(a)(3), its effect applies to only Sabbatarian worship 3) Section 701(j) really only applies to employers—not labor unions. (Brief and Reply Brief, IAM to the Fifth Circuit, page 8)

The Circuit Court dealt squarely and directly with these contentions holding contrary to the union's position. While the panel was divided on the issue of which of the Defendants were entitled to the defense of undue hardship, the majority was unequivocal that (1) both the union and employer must accommodate the Respondents' religious beliefs (2) Section 701(j) reaches religious beliefs covering not only Sabbatarianism, but also membership in or payment of monies to a labor organization (3) both the union and employer had a duty to accommodate and were both entitled to the defense of undue hardship.

Thus the union seeks certiorari on the very limited issue whether they must accommodate employees' religious beliefs which forbid his or her financial support of a labor organization.

ARGUMENT AGAINST GRANTING THE WRIT

1. The balance of 701(j) with 8(a)(3) accurately reflects the latest Congressional policy in the field of labor relations.

In the Court's recent decision of *Franks v. Bowman Transportation Company*[7], the Court reaffirmed the recent change in Congressional policy concerning individual rights in the employment sector:

> "We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin. *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1972); *Griggs v. Duke Power Company*, 401 U.S. 424, 429-430 (1971), and ordained that its policy of outlawing

[7] ____ U.S. ____, 47 L.Ed.2d 444, 96 S.Ct. ____

such discrimination should have the "highest priority," *Alexander,* supra, at 47; . . . ."

When the union movement was fledgling cause in our nation's history, it became Congressional policy to protect that labor movement. It became apparent in the 1940's and 50's that the labor union movement had come of age, and Congressional policy moved toward fostering collective bargaining. Legislation in the last 10 years has shown a new concern in the field of labor relations. The majoritarian rights have given way to individual rights to have equal employment opportunity in the work force. It is now the highest priority of Congress that employees be free from discrimination in the arena of employment, and attorneys for plaintiffs in Title VII cases are in the nature of private attorney generals seeking compliance with this Congressional mandate.[8] Just as the labor policy emerged in favor of arbitration, the latest Congressional policy of freedom from discrimination is the commitment of our country.[9]

It is the position of the Respondents that the interaction of 701(j) and 8(a)(3) must be read together to arrive at today's Congressional policy in the field of labor relations. Just as the Supreme Court adheres to a policy of construing federal statutes to avoid serious doubt of their constitutionality,[10] this Court also follows the policy of reading together federal statutes which apparently are at variance.[11] Dealing with the balance in effect between Norris-LaGuardia and the subsequently enacted proviso to paragraph 301(a) of the LMRA, this Court in *Boys Market* said:

[8] *Newman v. Piggy Park Enterprises* 390 US 400 (1968)
[9] *Alexander v. Gardner-Denver Company* 415 US 36 (1974)
[10] *International Association of Machinists v. Street* 367 US 740 (1961)
[11] *Boys Market v. Retail Clerks Union* 398 US 235 (1970)

"The literal terms of paragraph 4 of the Norris-LaGuardia Act must be *accommodated* to the subsequently enacted provisions of paragraph 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired austensibly inconsistent provisions . . .

The Norris-LaGuardia Act was responsive to a situation totally different from that which exists to date . . .

As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement into the encouragement of collective bargaining and to administrative techniques for peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the court to *accommodate,* to reconcile the older statutes with the more recent ones." (emphasis supplied)

Section 7 of the NLRA (29 USC 157) is the cornerstone of the majoritarian rights of employees to act collectively. Section 8(a)(3) of the NLRA (29 USC 158) prohibits discrimination against an employee in regard to hire or tenure of employment. This prohibition runs a true course through the other provisions of the NLRA to protect individual employees except for proviso of 8(a)(3) which carves out an exception for union security. Without the proviso to 8(a)(3), a union security provision and a collective bargaining agreement would, on its face, violate 8(a)(1) by interfering with, restraining, or coercing employees; would violate Section 8(a)(2) prohibiting an employer from "contributing financial or other support" to a union; and, would

violate 8(a)(3) because it is discrimination in regard to "tenure of employment".[12]

Thus, the agency shop agreement sought and obtained by the IAM only has the dignity of a contractual provision allowed by proviso to an otherwise general rule against discrimination.[13]

There exists a license to discriminate. Without the proviso to 8(a)(3), the IAM would be restraining and coercing employees in

[12] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).*" (emphasis supplied)

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(3) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement* * *"

[13] Pet. App. page 7

violation of 8(b)(1)(a), and would be causing an employer to discriminate in violation of 8(b)(2).[14]

It was against the background of this proviso that the Fifth Circuit decided a private contract between private parties to discriminate will not be exalted above the expressed statutory commands against discrimination. Admittedly, the Courts have held against individual employees whose First Amendment rights were balanced against union security clauses *prior* to the passage of 701(j). Congress placed a balance into their new legislation which provided the right to individual freedom qualified by undue hardship. What employees had been seeking under First Amendment sanctions was complete exemption from union security regardless of its impact, financially or otherwise, on the unions. Congress weighed and balanced the considerations previously sanctioning union security, and gave to the employees the right of religious freedom in the employment sector if such freedom did not cause undue hardship to others. The requirement to accommodate by unions is a qualified right given to employees under Title VII; the First Amendment protection is an absolute right which was sought unequivocally against the unions. Congress further evidenced its new attitude over equal employment by amending the National Labor Relations Act to grant absolute rights to employees in the health care industry.[15]

[14] 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7* * *"

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)* * *"

[15] 29 USC 169. Contrary to the position of the IAM, Respondents contend that Section 19 grants additional coverage than that afforded under Title VII. This additional coverage indicates not only a new Congressional attitude, but also solidifies that "charity-substitution" is a reasonable form of accommodation for 701(j). cf. Judge Gee 533 F.2d.170, Pet. App. A-13.

2. The Fifth Circuit Correctly Decided the Issue on Duty to Accommodate

The IAM has presented for review a single question that is susceptible of answer only in a bifurcated state. Paraphrasing Judge Rives in his opinion (concurring in part and dissenting in part) the issues are as follows: (1) "Does Title VII impose a duty on the employer and unions to accommodate the religious beliefs of employees and (2), if so, does that duty extend to religious beliefs concerning payment of monies to unions.

A. Duty to Accommodate

At the outset it should be pointed out that all members of the Fifth Circuit panel agreed that the union owed a duty to accommodate. The only dissent was from Judge Rives as to the scope of that duty (533 F2d. @ 175; Pet. App. A-23). The question presented for review suggests that no duty exists; but, if so, only to the extent of an employee's Sabbatarian beliefs.

The statutory duty is imposed by the precise language of 701(j). As traced by Judge Gee, and briefed extensively at the lower Courts, 701(j) was enacted in response to this Court's affirmance in *Dewey v. Reynolds Metal.*[16] The Sixth Circuit had expressed doubts in *Dewey* that EEOC had power to adopt such guidelines as regulation 1605.1.[17] The Courts by 1971 treated religion cases under the regulation as lawful if they were applied without discriminatory intent.[18]

Congress could not have made in more clear terms its disapproval of the Court's treatment by enacting the most precise

[16] 402 US 689 (1971)

[17] 29 CFR 1605.1(b)

[18] A curious treatment clearly disapproved by the Supreme Court.in 1971 in *Griggs v. Duke Power Company* 401 US, @ 432. (1971)

of statutory language. ("All aspects of religious observance and practice, as well as belief") The Congressional record does indeed show that these terms extend to any belief that can be termed religious.[19]

The one Circuit Court dealing with the duty to accommodate under regulation 1605.1 (as opposed to 701(j) as presented in this case) found that both the company and union had a duty to accommodate.[20] Conceptually if the lower Courts were to be in agreement with Petitioner's argument of "no duty", there would be no reason to reach a discussion of accommodation or hardship (Pet. App. A-28 thru A-50). Thus far the Fifth and Ninth Circuits have consistently remanded to the trial courts with instructions that the union and company are to accommodate.[21]

B. Scope of Duty to Accommodate

Congress has spoken in broad terms which cannot be misunderstood. The encompassing verbiage, "*all* aspects of religious observance and practice, as well as belief", is entitled to the widest of judicial application. The legislative history of 701(j) is supportive of this wide scope of afforded protection.[22] As previously pointed out the Senate floor discussion showed that

[19] 118 Congressional Record, page 713, Senator Dominick indicates that 701(j) would extend protection to a religious sect such as the Amish. Amish are not Sabbatarians, and possess other beliefs at variance with the Respondents. This again evidences a qualified protection to all religious beliefs if they do not constitute hardship.

[20] *Yott v. North American Rockwell* 501 F2d 398, 403 (CA 9, 1974)

[21] *McDaniel v. Essex* is on appeal to the Sixth Circuit in 76-1674; *Burns v. Southern Pacific Transportation Company, et al* is on appeal to the Ninth Circuit in 76-1188.

[22] See the Fifth Circuit opinion, footnote 9, 533 F2d. @ 168 (Pet. App. A-8, 9). Footnote 9 also shows comments from the Chairman of the House Committee . . . "reasonable accommodations for employees whose religion may include observances, practices, and beliefs *such as Sabbath observance* . . ."

the protection was to extend to the Amish who are not Sabbatarians. One Circuit Court has even given broad scope in affording coverage under 701(j) to an atheist's beliefs. *Young v. Southwestern Savings and Loan* 509 F2d 140 (CA 5, 1975) Certainly, the appellate courts have yet to disagree on the union's duty to accommodate religious beliefs in light of union security provisions authorized by statute.

3. There is no Conflict Among the Circuit Courts of Appeal

There are only two appellate decisions that have attempted to resolve the question raised by Petitioners. In *Yott,* as previously indicated, the Ninth Circuit actually deals with harmonizing a union security provision with regulation 1605.1. On the other hand, the Fifth Circuit in the present case squarely dealt with the interplay between the agency shop clause and 701(j). The opinion in *Yott* was unanimous that the union owed a duty to accommodate. The Fifth Circuit's unanimous agreement that the union owed a duty to accommodate necessarily implies a finding that 701(j) "reaches" 8(a)(3). The majority of the panel found that accommodation extended to religious beliefs against the payment of monies to unions. While the door is not yet closed on the judicial guidelines for undue hardship, the duty to accommodate in face of union security has been consistently announced.

CONCLUSION

The IAM's position that union security authorized by 8(a)(3) is the impregnable pivotal point of our labor policy is untenable. The Congress has given a qualified right of reasonable accommodation to employees in application of their religious beliefs to the work sector. When these two competing interests are read side by side, they can be harmonized by implementing Congress's

mandate so that discrimination is removed in the field of employment. The harmonizing necessarily requires the relinquishment of majoritarian rights only to the extent that would cause undue hardship.

Congress spoke in words of resounding broadness in the duty and scope of accommodation to be given. Religious beliefs of both atheist and religious believers are to be accommodated. The views of all of Congress are not to be reflected by general discussion of Sabbatarianism.

The panel of judges for both the Fifth and Ninth Circuits are in complete agreement that under Title VII there exists a duty to accommodate. It is implicit in this conclusion that accommodation is owed that 701(j) reaches and compliments 8(a)(3) as a pronouncement of today's national labor policy.

For the above reasons, the writ of certiorari should be denied.

Respectfully submitted,

DAVID WATKINS
1212 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247
Attorney for Respondents

Of Counsel:
JENKINS & WATKINS, INC.
1212 Tower East
1341 W. Mockingbird Lane
Dallas, Texas 75247

JOHNS & CARSON
6930 Carroll Avenue
Washington, D.C. 20012